82-1931

NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

ELI MESIROW and THOMAS MORRIS,

Petitioners,

vs.

PEPPERIDGE FARM, INCORPORATED,
a Connecticut corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a manufacturer obtain price control over a nationwide group of independent businessmen by assuming the insurance on the stock while expressly disclaiming most of the significant product risks?

2. Does the Simpson Rule prevent judicial analysis of product risk taking factors when a nationwide manufacturer uses consignment agreements to fix and control prices charged by a widespread group of independent businessmen who are fully accountable for the success of their businesses?

3. May summary judgment under the antitrust laws be granted a manufacturer who has a scheme to force route splits on independent distributors who must purchase the route from an outgoing distributor or the manufacturer, who exercises preemptory cancellation of agreements in disputes with independent distributors and

who establishes exclusive territories and fixes prices from the factory to the consumer although the product passes through two channels of independent entities?

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I.

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II.

LIST OF PARTIES

A list of all the parties to the proceeding is contained in the caption.

III.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is, as yet, not officially reported and appears at 1982-83 Trade Cases ¶65,164. A true copy of the opinion of the Court of Appeals is attached hereto as Appendix A. A petition for rehearing was denied. Said order is attached hereto as Appendix B. The opinion of the trial court which was affirmed on appeal, is not officially reported and appears at 1981-82 Trade Cases ¶64,292. A true copy of the opinion of the trial court is attached hereto as Appendix C.

IV.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 25, 1983. A Petition for Rehearing was timely filed. It was denied on April 5, 1983 (Appendix B herein). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

V.

STATUTES INVOLVED

The statutory provisions are § 1, amended § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and § 4 of the Clayton Act, 15 U.S.C. § 4. The provisions of the McGuire Act, § 5(a) of the Federal Trade Commission Act, 66 Stat. 631, 15 U.S.C. §45 (1952), and its repeal effective March 12, 1976 are also pertinent. These statutory provisions are attached hereto as Appendices D, E, F and G.

VI. CONCISE STATEMENT OF THE CASE

A. The Parties

1. Plaintiffs

Plaintiffs are experienced wholesalers of goods sold to chain retailers. Mr. Mesirow became a franchised distributor of Pepperidge Farm in April, 1970 (Excerpt of the Record, hereinafter "ER.", 67-77). At this time he paid the outgoing distributor $10,000, $5,000 of which he borrowed from Pepperidge Farm (ER. 627-629). At that time his franchise included Vallejo, all of Oakland, all of Contra Costa County, and all of the heavily populated areas of Alameda County north of San Lorenzo and Hayward (ER. 59, 86). The District Sales Manager at the time was Richard Montreal (ER. 444).

His step-brother, Thomas Morris, became a distributor of Pepperidge Farm Products in April, 1970 when he acquired a part of Mr. Mesirow's territory and another franchise for $3,500 (ER. 913). Petitioners formed a partnership to share

expenses and profits of these businesses (ER. 59-60).

2. Defendant Pepperidge Farm

Pepperidge Farm is a wholly owned subsidiary of Campbell Soup Company which bakes and distributes bread, rolls, English muffins, stuffing, cookies, crackers, croutons, frozen pastries and layer cakes (ER. 15). The product lines involved here are cookies, snack crackers, stuffings and croutons (ER. 75, 88). Pepperidge Farm divides its distribution of these products to two types of distributors: (1) consignee distributors (d/cs) and (2) specialty distributors (ER. 448). It has distinct arrangements with consignment distributors with respect to stuffings and croutons. These are the subject of a special letter allowing Pepperidge Farm to discontinue supplying such dry products on 30 day notice (ER. 88-89, App.I, 28, 29). The same chain stores billed by specialty distributors

may not be billed by the consignee distributors (ER. 441, 448).

Pepperidge Farm is a nationwide company with manufacturing facilities in various places in the United States (ER. 15). It is a dominant company in the premium cookie business as shown by its own studies of the San Francisco market area (ER. 472-481). The San Francisco market area is defined as Alameda, Contra Costa, Marin, San Francisco and San Mateo Counties (Id.). The 1977 Report showed that Pepperidge Farm is displayed in 86.7% of the retail market ("% share mkt."). The directly billed chains constituted 72.5% of the total food market (ER. 475) and 42% of Pepperidge Farm's sales (Id.). In this surveyed area, it had an average of 216 inches of space per store at Safeway, 24.8% of the market, with $4.06 sales per foot of store space per week. Its products are thus prominently displayed in 769 out of 899 available stores in this area (Id.).

In the 1979 fiscal year, Pepperidge Farm's nationwide biscuit sales were $58,232,000, and its crouton and stuffing sales were $19,224,000 (ER. 372). It is undisputed that, at all times herein, Pepperidge Farm biscuit and dry products were distributed through persons whom Pepperidge Farm itself designated as self-employed, independent businessmen (ER. 373). The 1970 and 1977 Consignment Agreements are attached hereto as Appendices H and I. They state (ER. 70, H-14; 1977, ¶14, ER. 84, I-15):

> "15. **INDEPENDENT BUSINESSMAN.** The Consignee is a self-employed independent businessman, not an agent or employee of the Bakery, and has no authority other than to sell products consigned to him hereunder, express or implied, to do or perform any act or thing or to make any warranty or representation or promise or commitment of any character which will be binding upon the Bakery or for which it will be responsible, and he will refrain from any conduct inconsistent with the terms of this paragraph."

B. The Distribution System

1. Period 1970 to January, 1976

During the period 1970 - January, 1976, Pepperidge Farm distributed cookie products as follows: it printed in indelible ink the consumer price per package, without the slightest indication it was a suggested price (ER. 63, 1494); it delivered the ordered quantities to the warehouse of the independent distributors on either an order or standard shipment basis (ER. 63). The independent distributors were obligated to adequately stock each store, to take orders from the retail stores, to deliver the cookies, to unload them and to sell at the prices instructed by Pepperidge Farm at wholesale (ER. 59-65). It purported to utilize Fair Trade legislation but also disclaimed using Fair Trade at retail (ER. 1496). Pepperidge distributed price lists setting forth the wholesale price the distributor was to charge and the retail price per package (ER. 75). The distributors signed Fair

Trade Agreements contemporaneously with the Consignment Agreement (ER. 76-77). Paragraph 11 of the Consignment Agreement specifically reserved the right to fix prices to the extent permitted by law (ER. 70, ¶11). Except for theft, accepted damaged returns, and Acts of God, the distributor was liable for all cases delivered to him (ER. 220-226, 444-447). Other risks assumed by the distributors are as follows (ER. 437-459, 1493-1500):

1. The inability to obtain credit for unsold and returned product. This is provided in a specific letter to be signed by the distributor. It reads (ER. 68, H-28):

> "Products which you sell to your customers may not be returned to us for credit by reason of damage or by reason of over-code (over-age) nor will you receive credit for any complimentary products you may distribute. We may make exceptions, of course, by giving you written notice in particular cases.
>
> "You agree to continue maintaining an adequate and fresh supply of franchise products in all stores and to continue removing

promptly all damaged and over-code products from the stores. Over-code products may be sold to stores dealing exclusively in stale products, but you agree not to sell such products to any other purchaser.

"Please acknowledge recept of this letter by signing and returning to us the attached copy of this letter."

2. Inability to return cases when wholesale and retail prices are changed upward and chains refuse to accept the attempted hiding of the old price (Id., see, also, ¶ 18; ER. 438, ¶ 2(g)).

3. The risk of unsold products when customers do not accept the new increased pricing.

4. The receipt of short coded cases when managers refuse to allow a return.

5. Inability to return cases purchased for new products which are discontinued (See, also, ER. 1498, ¶ 17).

6. The failure of Pepperidge Farm managers to carry out promises of credit for returned goods.

7. Liability for removal of stock regardless of when payment received from his accounts.

8. Loss of control of promotional activities with the individual stores of the direct billed chains, of whether to service unprofitable individual chain stores, of judgment as to the quantity of cookies to display by variety and place on the shelf (Id., ER. 438 ¶ 2(e), (h). See, also, ER. 446, 447).

At least four times a year Pepperidge Farm engaged in promotions on one or more of its products. These promotions involved meeting with distributors by territory. At these promotion meetings, product quotas are assigned by Pepperidge Farm in writing (ER. 446, 1481-1482). Assurances were given by the Pepperidge Farm managers that the quotas are sellable; that (as to stuffing) if unsold, credits will be issued; that unsold products will be removed from the inventory reports, that reporting of removed inven-

tory could be delayed pending payment (Id.). In order to get rid of the quotas the distributors were required to unload on their large accounts and accept back cases which were unsold (ER. 440, 441; 446, ¶ 5 (3)).

The only known servicing of the directly billed accounts by Pepperidge Farm employees are: (1) discussion of promotions; (2) obtaining agreement on shelf space; (3) obtaining agreement on the individual stores to be serviced. Promotions are discussed on a chain basis, but the specific orders by quantity are made by the individual distributor for the specific stores who must deliver and fully stock the store (ER. 437-438).

Distributors were gathered together at meetings and informed of the new prices they were to charge all of the accounts (see ER. 441-442).

Many of the distributor's chain stores were reserved by Pepperidge Farm for pricing and volume negotiations. Pepperidge

Farm negotiated prices and quantities with these accounts on a chain basis and then sent out instructions to the individual distributor telling him his delivery requirements (ER. 1480-1481). These chain accounts may be referred to as hybrid chain accounts. The categories of retail accounts thus are: Pepperidge Farm Chain Accounts; Pepperidge Farm Hybrid Chain Accounts; Distributor Accounts; (a) Individual Distributor Chain Accounts and (b) Distributor Mom and Pop Accounts. The Pepperidge Farm files admit it engaged in price negotiations with the Hybrid Accounts and instructed the distributor on the quantities he was to deliver to them (ER. 1437):

> "IV. Chain Calls
> Payless is set for the ad on the 14th. All orders have been sent out to the distributors and initial orders have topped 3,000 cases of Old Fashioned which should help us turn around a negative sales trend.
>
> "I have presented Mr. Russell with our Goldfish promotion and if everything goes smooth this

month, we should be able to procure another ad next month."

All during this period of time Pepperidge Farm sold its cookies direct to the consumer through the Pepperidge Farm direct mail operation, asserted to be a subsidiary of Campbell Soup (ER. 1055). During Fair Trade, Pepperidge Farm held meetings between itself, the consignee, distributors and the specialty distributors to obtain agreement on the wholesale price of stuffings and croutons (ER. 441).

2. Period 1976 to 1977

When Fair Trade was terminated it took Pepperidge Farm considerable time to obtain even a forced acceptance of a new consignment agreement. Its first agreement in 1976 was so onerous that a nationwide revolt of distributors took place. Eli Mesirow was one of its leaders (ER. 439-440).

3. Period 1977 to May, 1978

A new franchise agreement was signed by the petitioners in May, 1977. Few

changes were made. The Pepperidge Farm directly billed chain accounts were no longer the subject of an accommodation agreement between the company and the distributor but became reserved accounts. The distributor was required to solicit the chain on Pepperidge Farm's behalf, to agree to allow Pepperidge Farm to price the sales and to send the chain the invoice (Appendix I, ¶ 3(b)). The provision reads, (ER. 83):

> "3.(b) The Bakery will bill directly all chains and military commissaries that have requested such direct billing or that request it in the future. Such stores in the territory will be direct customers of Bakery, and the Consignee will solicit sales from them and receive product for delivery to them on the Bakery's behalf at Bulletin Prices. Consignee shall have the exclusive right to perform the service of delivery of Consigned Products to such direct customers of Bakery and Bakery shall not effect such delivery except through Consignee, subject to the provisions of Paragraph 6, 7 and 9. For the performance of his services of solicitation and delivery under this subparagraph (b), Consignee shall be paid a percentage of net proceeds paid to Bakery by the direct billing customers, such

> percentage to be calculated at the rate specified in Schedule (B)."

References to resale price control were eliminated. Although Pepperidge Farm claimed that it shoulders all the risks of loss of non-payment, in fact the contract requires the distributor to assume the risk of his share of the non-payment (ER. 91, Appendix I-31). Mr. Mesirow and Mr. Morris were required to sign the new agreement in order to remain distributors (ER. 61).

Pepperidge Farm continued to print the consumer prices on each package and to issue price schedules showing its price to the distributor and the pre-ticketed price (ER. 96). For a time its price lists stated, "P.F. Price to Retailer" (ER. 61, 96-97).

The accounting was changed to show the sales to the direct billed accounts (ER. 209). The distributor was credited with the wholesale price of the deliveries and

granted 20%. Pepperidge Farm continued to direct the prices the distributors were to charge all accounts (ER. 61, 439).

4. Distribution Contracts Were Terminable At Will.

The agreements with the distributors could be terminated at any time upon written notice (ER. 71, 85; Appendices H, I ¶¶ 17, 18, 19). If the termination is without cause, the distributor is entitled to payment for his fair market value plus 25% of such value.

5. Distributors Were Forced to Sell Portions of Their Territory Because of Coercive Tactics.

The distributors were subject to a scheme to constantly reduce their territories by means of pressure tactics. The more business a territory developed, the lower the number of deliveries per stop the one truck distributor could make. Pepperidge Farm then demanded and received route splits. The means used were opening

new accounts, insisting on more stops, conducting excessive managerial inspection trips, issuing of stale credits to the retailer, charging the distributor at retail, and demanding immediate payment of all amounts claimed due. Sales managers were ordered by national headquarters to obtain route splits (ER. 1440-1470). An ex-District Sales Manager and Territorial Manager of Pepperidge Farm, during the period 1968 to 1971, Mr. Montreal, so testified (ER. 444). The National Sales Manager, Mr. John E. Tierney, whose declaration is the basis of the granting of summary judgment, told Mr. Montreal that Pepperidge Farm's policies should be enforced on distributors regardless of the legalities (ER. 1460).

During the period 1970 - May 1978, the petitioners went through six territorial splits in order to pay claimed obligations to Pepperidge Farm for products (ER. 1480). Mr. Mesirow declared (ER. 1480:8-26):

"4. Each time I sold portions of my Pepperidge Farm territory, it was to pay Pepperidge Farm for amounts claimed due by it. Most of the sums received were plowed back into the business. Our losses on stales was a substantial reason for these sales. I have prepared an exhibit in this case, Plaintiffs' Ex. 315. This exhibit shows, and I aver, that my step-brother and I invested at least $238,024 in the Pepperidge Farm business; that out of a franchise sale in October, 1977 for $33,000 Pepperidge Farm received $13,000; out of sale in March, 1978 for $32,000 Pepperidge Farm received $21,736; and out of a sale in October, 1978 Pepperidge Farm received $10,000; that in May, 1978 Pepperidge Farm claimed I owed it another $33,000. I have never, at any time, been told that Pepperidge Farm allowed me the option of putting on additional trucks or splitting my territory. On the contrary, I was told that the route split was the only way to get out of my financial difficulties. I applied for a loan to Pepperidge Farm for $25,000 in March, 1978, which was denied. If, in fact, second trucks were a realistic alternative, this request should have been granted."

C. Injury to the Petitioners

The rigid procedures of Pepperidge Farm were enumerated to Mesirow and Morris. In 1972, petitioners attempted to

invoice the Long's Drugs chain, their largest chain account, at prices of their own choosing. They increased the price in order to obtain Long's agreement with respect to promotional advertising for which they would grant a rebate. Mr. Wayne Bonesteel, then Pepperidge Farm's District Sales Manager, told the petitioners they were not to charge Long's any other price than Pepperidge Farm's wholesale price and that their franchise would be terminated if they did so (ER. 64).

About a year later Mr. Mesirow began billing Safeway for direct payment to his company. Mr. Bonesteel told Mr. Mesirow that if he continued to bill the chain store accounts direct, they would make it rough on him. Mesirow ignored the warnings, and thereafter Mr. Bonesteel began checking Mr. Mesirow's accounts. He made it clear that pressure was being put on him in order to stop billing Safeway. Mr. Bonesteel approached Mr. Mesirow at the warehouse and stated, "You are going to

bring on a lot of trouble for yourself. I do not advise you to continue to bill the chains direct." (ER. 60-61.) Mr. Mesirow stopped the direct billing. (Id.). Mr. Mesirow's testimony concerning these conversations is undisputed.

About 1974 Mr. Morris convinced Long's Drugs on the advisability of a statewide advertising for Pepperidge Farm products. Mr. Morris was able to arrange for delivery to Long's statewide in connection with the statewide advertising (called "tab") but was prevented from doing so by reason of a territorial clause in the consignment agreement (ER. 1482-83).

About March 1977, Mr. Mesirow sold some over-codes to a Stale Goods outlet in California. It had a store in San Francisco and the desired stales were delivered to San Francisco. He was then told by Pepperidge Farm that he could not deliver stales outside his territory. A distributor in San Francisco had sent in a letter of protest (ER. 64).

In 1977 Mr. Mesirow was encouraged by Pepperidge Farm to open up a Thrift Store to sell over-code fresh bread products and over-code biscuits within its policy. Pepperidge Farm was attempting to get into the fresh bread market in the San Francisco Bay Area through independent distributors (ER. 158). Pepperidge Farm determined to discontinue these efforts and the Thrift Store became undesirable (Id.). Thereafter Pepperidge Farm had no interest in it. About October, 1977 Pepperidge Farm went to the Mesirow and Morris Thrift Store and painted out the Pepperidge Farm trademark (ER. 64). It later sued petitioners for misuse of its trademarks at the Thrift Store, but dismissed its causes of action (ER. 19-26, 1645).

In the Fall of 1977, Mr. Mesirow was involved in an extensively litigated divorce case. Pepperidge Farm in March 1978 demanded that all the inventory be counted and all out of code and past dues be

immediately paid for (ER. 336-340). Demand was made for $33,000.00 (ER. 159, 870-871, 1480). On May 10, 1978, Mr. Tierney, in Connecticut, addressed a termination for cause letter to Mr. Mesirow, in California, effective May 13, 1978 (ER. 871). Demand had been made by Mr. Mesirow for credits for the unsold over-code product (ER. 759). There was $11,000 of unsold over-code product sitting in the warehouse which Pepperidge Farm refused to take back (Id.), although its District Manager had allowed it to be unaccounted for (Id.), and under the consignment agreement they were owned by Pepperidge Farm.

In a two and a half year period, petitioners' stales amounted to $35,666 (ER. 98). For the four year damage period stales were estimated to be $60,000 (ER. 63).

Pepperidge Farm then took the territory over in May, 1978, and sold it to a third person for $30,000 (ER. 231-232).

Pepperidge Farm refused to credit the Mesirow account for this sum and has sued him for an additional $33,646 on the alleged rolling account between the parties (ER. 28-29).

After the filing of this complaint, Mr. Morris was allowed to sell his remaining territory to his ex-distributor, Mr. Garcia (ER. 1395).

In 1977 the Sacramento Distributor, Mr. Hubert, was granted a $15,000 loan to keep his "bill current" (ER. 461-462). His inventory reports had been used to cover his accounts receivable. The loan was to balance the books (Id.). In 1978 Mr. Mesirow's request for a $25,000 loan was denied (ER. 1480).

ARGUMENT

I. This Court Should Prevent All Significant Breaches of the <u>Simpson</u> Rule Prohibiting Resale Price Fixing on Independent Businessmen Whose Livelihoods Depend on Their Own Initiative, Effort and Continuing Investment of Capital Into Their Businesses.

A. <u>Simpson</u> Precludes the Risk Taking Analysis Undertaken Here, Resale Price Fixing Being Imposed on a Widespread System of Independent Distributors.

1. Petitioners Were Entitled to Summary Judgment on the Use of Express Clauses in Consignment Agreements to Fix Resale Prices, 1974-1978.

Petitioners are entitled to a <u>per curiam</u> reversal; it being undisputed that Pepperidge Farm's purpose was to control resale prices among a widespread group of independent distributors. The current breach in the wall restraining a manufacturer's resale price control mandated by Congress should be the subject of instant rejection. Independent businessmen who invest their capital and labor are protected from interference with their business judgments by those who control the

nation's manufacturing assets. Pepperidge Farm has thus far been able to obtain an impermissible exception by the specious argument that the price fixing accommodates large chain retailers. In fact, it is relying on the investments and warehouse distribution of independent entities. Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964), 396 U.S. 13 (1969) established the rule which prevents nationwide manufacturers from controlling the price judgments of those who are in business for their own account by consignment agreements. Simpson held: (1) The promulgation of uniform consignment contracts over a widespread distribution system by which the manufacturer controls the resale prices of independent businessmen is a violation of § 1 of the Sherman Act during Fair Trade and thereafter; (2) If the consignment contract is being enforced in a Fair Trade State, the case goes to the jury with instructions that the system is violative of the Sherman

Act, and the burden is on the manufacturer to prove the applicability of the McGuire Act, 15 U.S.C. § 45; (3) Whether or not the widespread utilization of resale price maintenance on a group of independent distributors is a violation of the Sherman Act § 2 raises material issues of fact which cannot be decided in summary judgment.

Simpson disposes of the distinctions announced below. Simpson is within a progeny of cases involving resale price maintenance in which the manufacturer specifically declines to distribute through employees or bona fide agents. If a manufacturer fears unionization of employees hired to distribute its products

under its control, it must forego resale price control of independent contractors.

Simpson is to be read in the light of Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) and United States v. General Electric Co., 272 U.S. 476 (1926). In Dr. Miles, the Court held that a system of controlling prices at wholesale and retail through the wide-spread use of consignment or agency agreements was resale price fixing prohibited by the Sherman Act upon the showing that the so-called "agents" were not agents but those who purchased to sell. The Court in General Electric allowed the use of consignment agreements through nationwide contracts with retailers upon the showing that the consignment agreement provided for the following obligations on the part of the manufacturer: (1) the lamps remained the property of the company until sold; (2) the proceeds of the sale were held in trust for its benefit; (3) it paid all taxes; (4) it assumed the risks of

price decline; (5) and of fire, flood or obsolescence; and (6) obtained payment only after the retailer received payment. On the other hand, the agents were: (1) responsible for lost, damaged or missing items from stock; (2) obligated to pay all expenses of storage, transportation, handling and distribution; (3) obligated to pay the manufacturer the value of all the company's lamps lost or missing or damaged in the stock in their custody.

Simpson limited General Electric to a patent reward case and made the Sherman Act's prohibition against resale price maintenance an obstacle to controlling the prices which clearly separate business entities charged others.

The learned courts below do not cite any cases from this Court which allow manufacturers a gift of resale price fixing if they carry insurance on the stock, but do not assume most of the risk of the product. This Court has consistently

supported a found Congressional intent to outlaw vertical price fixing which involves an appreciable amount of interstate commerce. _Continental T.V., Inc. v. G.T.E. Sylvania, Inc._, 433 U.S. 36 (1977), _California Retail Liquor Dealers Ass'n v. MidCal Aluminum, Inc._, 445 U.S. 97, 102 (1980), wherein the Court stated that it had "ruled consistently that resale price maintenance illegally restrains trade". Indeed, Congress in 1975 outlawed all federal support of resale price maintenance.

Simpson is thus directly applicable for the period 1974 to 1976 when Pepperidge Farm utilized the force of widespread consignment distribution contracts to enforce resale prices in Fair Trade States. It is directly applicable to the period 1976-1977 when Pepperidge used the consignment agreement to fix resale prices without the color of fair trade law or contractual provisions. It is directly applicable to the 1977 Agree-

ment which expressly took away price judgments for accounts directly serviced by the independent distributor.

The independent wholesalers are only the first step in Pepperidge Farm's fixing nationwide prices from the factory to the purchaser. Yet, General Electric, supra, and Simpson, supra, also prohibit a manufacturer from fixing prices through retailers. Ever since Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8 (1918) industry was on notice that it could not maintain resale prices by notice. See also Straus v. Victor Talking Machine Co., 243 U.S. 490 (1917).

The control of prices on each level of resale is an objective of a manufacturer with a dominant position, but an ultimate purpose of the Sherman Act is to prohibit such control when goods are put into distribution by independent business entities. The only "premium" cookies sponsored by one with nationwide deep pocket power are those of Pepperidge Farm (Depo-

sition testimony of Safeway Merchandise Manager, ER. 1425-1426). The record shows that Pepperidge Farm by contract, by direction and by device firmly controls the wholesale price to 87% of the retail market. It enters into agreements with its direct chain retailers, 50% of the market, to change prices simultaneously with other chains (ER. 1481-1492). The Pepperidge distributor is the means used to accomplish this price maintenance. Pepperidge Farm is shown to have made impressive profits in its manufacture and distribution of premium cookies (ER. 372).

Year	Dollar Sales	Net Pre-Tax Profit Margin
1973-74	$21,613,000	9.1
1974-75	27,653,000	13.1
1975-76	35,129,000	16.6
1976-77	38,938,000	12.9
1977-78	46,597,000	12.4
1978-79	58,239,000	11.9

These profits are based on the ability to price without regard to competition (ER. 1425).

B. The Ninth Circuit Is In Basic Conflict With The Fifth Circuit On The Issue of Reserved Accounts.

In Greene v. General Foods Corporation, 517 F.2d 635 (5th Cir. 1975), the Fifth Circuit examined virtually the identical issue as involved here; the attempted segregation of multiple chain purchasers from the general stock used to service the territory. It held that Simpson precluded such reservations. The system involved here is closely analagous. The distributor maintained the basic stock of goods. He was told to distribute coffee to General Foods' accounts (MFSA) at prices it established. The chain accounts did not buy specific quantities from the manufacturer and were serviced by the distributor. Conversations took place in which the distributors were told to sell at the manufacturer's price. The Fifth Circuit

held that the defendant had employed an impermissible price fixing scheme. The Fifth Circuit interpreted Simpson as precluding any device by which resale prices are fixed or controlled when it involves a vast system. The court stated, at p. 653:

> "Simpson, even if it did not intend to outlaw all devices whereby resale price maintenance is achieved, must be read to prohibit it where the risks of the distribution process are borne largely by numerous otherwise independent individuals or firms in competition with each other in a product for which there is a widespread demand on the level of the individual consumer."

The learned court below attempted to distinguish Greene on the grounds that title had passed, that Pepperidge Farm serviced the chain accounts and that Greene involved retailers. As to the latter point, the Fifth Circuit was clearly involved with a distribution contract in which a portion of the stock was claimed to be reserved for chain accounts. The former points are based on

a misconception of the record. Pepperidge Farm distributors were fully responsible for servicing the chain accounts. The Pepperidge Farm distributor took orders from the individual stores and had the responsibility of keeping them adequately stocked without regard to his judgment as to product mix or profitability of the chain store (ER. 437-438). Pepperidge Farm did not service, it simply entered into the central pricing, and developed promotions on a chainwide basis. When any servicing had to be done, it was a Pepperidge Farm distributor who did it. The Pepperidge Farm billing was based upon the delivery tickets of the distributor. There is no dispute over the fact that chains are billed pursuant to the individual distributor's tickets precisely as involved in Greene. The issue of title passing, although discussed in Greene, was not decisive. The Court of Appeals agreed with General Foods' attorney that the

contract reservation of title should not be decisive. The court stated at p. 657:

> General Foods suggests that 'it would, of course, be possible to institute a series of formalities,' for example, a requirement 'that the distributor maintain separate inventories . . . with no title ever passed to the distributor with respect to' the MFSA's, or alternatively, it would be possible to devise a set of documents whereby the distributor formally resells stock to General Foods before he delivers it on an MFSA order.' But, it concedes, if employing these alternatives would achieve a different antitrust result, the law would turn on meaningless technicalities. We agree, but it does not necessarily follow that antitrust consequences should depend only upon who are the parties to the MFSA contract. Ending the inquiry there would be as formalistic as the alternatives deprecated by General Foods."

The Ninth Circuit was faced with virtually the same issue. Title passes under the Pepperidge Farm scheme for the purposes of stale or damaged goods, for price declines, for new product failures and for physical control of the stock. It would appear that the Fifth Circuit viewed the risks of the distribution process as a whole and not on a seriatim analysis of particular product risks. It is submitted that the opinion below is inconsistent and contradictory to the holding in Greene.

C. Pepperidge Farm Is Not Entitled to Summary Judgment On Any Sherman Act Claim.

1. The Courts Could Not Ignore the Evidence of Pepperidge Farms' Purpose to Fix Prices Through The Distributors and The Retailers to The Consumer.

It is respectfully submitted that summary judgment was entered in the favor of Pepperidge Farm only through the courts' taking inferences in the favor of the moving party, of not viewing the evidence as a whole, and of improperly weigh-

ing the evidence in favor of the moving party. This is contrary to Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

The learned courts failed to fully view Pepperidge Farm's total integrated resale price fixing scheme in which prices are fixed at the factory to establish what the consumer will pay at the retail shelf. A change in Pepperidge Farm's indelible prices involved the retailer with incurring costs in order to effect price changes. This is more than suggested prices. Retailers will not charge more than a pre-set price. The costs involved in lowering prices by a large chain of retail stores mitigates against the change. It was shown to result in meetings with Pepperidge Farm to obtain its consent and use of its distributors to change prices free of charge (ER. 1481, 1485). These retail prices provide a ceiling on wholesale prices since the retailer will demand a margin

consistent with his retail price and the costs incurred in any downward revision. This is beyond the limited dispensation allowed in United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Further, there was overwhelming evidence that Pepperidge was actively directing prices charged by the distributors to retailers. The simple admonition of Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), prevented the courts from isolating the transactions and conversations here into separate time periods. The trial court relied on Mr. Mesirow's testimony in support of an entry of summary judgment on lack of proof of the control of the price to Distributor Accounts (ER. 730-731). The following testimony is held to be supportive of defendant's claim that it stopped directing wholesale prices to distributor accounts after 1976 (ER. 1627: 19-20, testimony of Mr. Mesirow (ER. 730:19-731:6):

"Q. All right. Did Pepperidge Farm ever tell you after 1972 or 1973 when Mr. Bonesteel, according to you, made a remark about wholesale prices to Longs, after that time did Pepperidge Farm ever tell you that you could not charge Longs any wholesale price that you wanted to charge them?

"A. I'd look like a fool, wouldn't I, with them getting a bulletin from Pepperidge Farm?

"Q. Did Pepperidge Farm ever tell you you weren't supposed to charge Long any --

"A. It was an understood fact.

"Q. Did anybody at Pepperidge Farm ever tell you that you couldn't do that?

"A. In the year '73?

"Q. After the time which you testified when you had a conversation with Mr. Bonesteel.

"A. Not that I can recall."

Thus, contrary to the rules governing summary judgment, a negative becomes a positive. The positive testimony is that Pepperidge Farm controlled his price to Long's (ER. 727).

The trial court and the appellate court are even in conflict. The trial court has found that petitioners never charged a price different from that used by Pepperidge Farm for its accounts (ER. 1628, App. C, 24). The appellate court has found that Mr. Mesirow testified that he always charged Long's a different price (App. A, p. 11:2-5). It appears to rely on the following testimony (ER. 726:1-28):

> "Q. And did you ever charge Longs a different price?
>
> "A. Yes.
>
> "Q. Well, then, that was your price, not Pepperidge Farm's price?
>
> "MR. DURYEA: Objection, Counsel. There is no foundation as to time period when this witness charged his individually set price to Longs as opposed to Pepperidge Farm. The witness was the distributor from January, 1970 to 1978. You have covered a three-year time period, and now you are attempting to distort the witness' testimony.
>
> "MR. HAINLINE: Thank you, Mr. Duryea.

"Q. Mr. Mesirow, when did you charge Longs your wholesale price?

"A. I've already answered these questions in previous depositions, but I'm going to answer it once more for you.

. . . .

"Q. Would you please do that now, Mr. Mesirow?

"A. When Wayne Bonesteel was my DSM, I charged Longs Drug Stores and all the independents that I was calling on 24"

At ER. 727:9-14:

"Q. Mr. Mesirow, from 1976 on, did you ever charge Longs or other accounts that you billed a price different from the wholesale price that Pepperidge Farm was charging the accounts that it billed?

"A. Longs Drug Stores I do not charge because Pepperidge Farm sent out their bulletin price list to them."

At ER. 1513:15-1514:5: petitioners had informed the trial court as follows:

"As to App. 1, ¶ 40, there is not one sentence in Tab F. which in any way indicates that Mesirow & Morris billed Long's at a price they choose to bill. Page 62 had to do with small 'Ma and Pa' stores, independent stores. Page 416 has to do with the definition

of 'chains.' Mr. Mesirow was emphatic that defendant fixed his price to Long's. The specific testimony of Mesirow at 418:

"Q. ... Pepperidge Farm fixed what price with Long's?

"A. The wholesale price.

"Q. What years? After Fair Trade expired?

"A. 1976, 1977, 1978 ... and prior to that, really."

At page 419, Mr. Mesirow made it clear that when he charged a different price than Pepperidge Farm's to Long's, Mr. Bonesteel made him stop.

Mr. Mesirow was referring to non-chain accounts at p. 423 to which he charged 24 cents a case more (p. 421).

As to App. 1, ¶ 41, Mesirow & Morris complained they were not free to charge their own price to their chain accounts. Mesirow testified at pages 421-426 that Pepperidge Farm told him the price to charge his direct accounts and by the device of giving price bulletins to them, it prevented his independent pricing."

No findings were made as to the Hybrid Accounts (ER. 1634). No finding was made to the proof of the assignment by Pepperidge Farm of purchase quotas.

2. The Basic Risk of The Products Is Unsold Product Which Is Borne By The Distributor Regardless of Billing Procedures.

The learned court found that the risks of the entrepreneurship for directly billed accounts fall on Pepperidge Farm (App. A, 10). The record contains the following evidence of its claimed risks: (1) Risk of non-payment (ER. 1082); total nationwide loss in 1978: $60,517. In fact, by contract Pepperidge Farm need not pay the distributor his share of any non-payment (ER. 83, ¶ 3(b)). There is no showing that any West Coast account or any chain account ticketed by Mesirow and Morris failed to pay; (2) Payment of inventory or personal property taxes; the record is silent as to dollars involved; (3) Insurance coverage on warehouse storage; the record is silent on the dollars involved. ER. 1081 disclosed that Pepperidge assumed the loss of $21,366 of stolen inventory from petitioners' warehouse.

This record does not justify the finding that Pepperidge Farm shouldered the risks of the product in the light of $60,000 of stales losses suffered by petitioners in four years. $11,000 in stales was sitting in the Mesirow and Morris warehouse in May, 1978; a risk Pepperidge refused to take. Yet, under its own argument, title to this product had not passed. Mr. Mesirow declared that 80% of his losses on the stales were from deliveries to accounts Pepperidge Farm directly controlled (ER. 1484). The findings of product risk are contrary to the record.

3. Pepperidge Farm Prevents Solicitation of Accounts Once They Are Tied to Its Billing System.

The Pepperidge Farm Agreements specifically require the Distributor to solicit the direct chain account on behalf of bakery (ER. 83, ¶ 3(b)). The learned court below has erroneously confused the historical opening of the accounts with freedom of solicitation. Once an account

is respondent's it cannot be solicited. Mr. Mesirow issued invoices to Safeway and was ordered not to do so (ER. 60-61). Pepperidge Farm cites evidence only that the chain stores have an election, not that the distributor has an election (ER. 561-566, 571, 592, 593, 1314, 1320, 1326, 1333, 1340, 1346, 1352, 1359, 1365, 1371, 1377, 1504). The only exception is a self-serving conclusion by Mr. Tierney (ER. 1019-1023; 1051-1053) which is directly impeached by the contractual provisions of his company which require delivery on behalf of Pepperidge Farm. The claim that distributors were free to solicit accounts after they became Pepperidge Farm's is directly contradicted by Pepperidge Farm's statement to the trial court at ER. 491:28-31:

> "They have an exclusive right within their territories to solicit and sell to distributor customers and to deliver upon commission to stores of Pepperidge Farm customers (App. 1, ¶ 44)."

This Court's requirement that the trial court, at the least, conduct a purpose or effect test was ignored. The purpose of Pepperidge Farm's price fixing policy is discussed below. If the distributor were free to solicit the chain accounts, one would expect significant variations in the sampling set forth in the Distributor's Declarations, *supra*. In fact, there are no significant variations:

ER. No.	Distributor By Name	Territory	Are Chain Accounts Billed by the Distributor (Listed at 75, 481)
1314	Amador	Santa Cruz	No
1320	Cox	North Central Bay Area	No
1326	Ennor	No. Alameda County	No
1333	Garcia	Alameda County	No
1340	Gee	Palo Alto San Mateo	No
1346	Hermann	San Francisco	Yes
1352	Karsh	San Francisco	No
1359	Leavitt	Palo Alto	No
1365	Lloyd	Pacifica, Daly City So.San Francisco	No

1371	Nicholson	San Jose Milpitas Santa Clara	No
1377	Pierce	Lake and Mendocino Counties	No
60-61	Mesirow & Morris	Alameda County	specifically prohibited

As to purpose, there is a distinction between selling and pricing. No reason is advanced to indicate why billing may not be based on distributor pricing. The distributor fills out the chain ticket and price. If it is erroneous, the computer will not record it, and the distributor will not receive a credit (ER. 62). Pepperidge Farm's attorneys have advanced the position that petitioners were in *per se* violation of the Sherman Act in entering into agreements with their distributors on the price to be offered to the chains on non Pepperidge Farm cookies (ER. 503). But this is precisely what Pepperidge Farm is doing by not separating central billing from price fixing.

4. There Are Material Issues of Fact in Dispute as to The Facts Found by The Courts.

Petitioners respectfully urge that there are material issues with respect to the facts found by the appellate court. In addition to the issues described above, there is bona fide dispute as to the following findings:

1. Appendix A-3, wholesale prices: contradicted by the showing of Hybrid chain accounts, supra.

2. Appendix A-11, risk of stales: Pepperidge Farms' employees used petitioners as a vehicle to push product at times of promotions under specific Pepperidge Farm quotas. These managers allowed petitioners to keep stales in the warehouse, but then on direction from headquarters, demanded payment (ER. 1483-1484, 440-441, 447-449, 1498-1550).

3. Appendix A - 12, 14, freedom of solicitation, discussed, pages 47-48, supra.

4. Appendix A - 16, direct mailing of product: Pepperidge Farm set wholesale prices and issued pre-ticketed packages while its parent company Campbell Soup Co. sold cookies direct to the consumer through mail order catalogues (ER. 1655).

5. Appendix A - 18, pricing of Long's Drugs, discussed above, pages 41-44, _supra_.

III. The Sherman Act's Protection of The Rights of Independent Businessmen From Predatory Practices Has Been Ignored.

A. Petitioners Filed Declarations Containing Direct Evidence of a Plan to Force The Sales of Portions of Territories on Independent Owners of the Territories.

1. Pepperidge Farm's Ex-Managers Have Sworn That Pepperidge Farm Had a "One Truck Only" Policy, Prevented Territorial Expansion and Coerced Route Splits.

Upon proof that a nationwide manufacturer has created a numerous and widespread network of independent businessmen by solemn contract, but, then, by practices uses them as employees, subject to

its orders and their rights made terminable by it at will, an attempted monopolization has been shown. Simpson v. Union Oil Co. of California, supra, 377 U.S. at 24; Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979). The intentions of Pepperidge Farm to ignore the provisions of non-agency and independence of its distributors were fully disclosed. The distributor was to be a man of small means with a family. He was not to grow too successful. As his territory grew in volume and he could not service it, he was to sell portions of it. If he did not agree, pressure was to be brought upon him. He was not assisted in obtaining another truck or expanding his staff. The managers were to obtain executed splits regardless of legality. The Executive Office did not care how it was done; the managers were to figure a way. This was the testimony of a former Territory Sales Manager of Pepperidge

Farm, Mr. Richard A. Montreal (ER. 1444-1449, 1453-1467, 1499). It is undisputed that managers were granted bonuses for obtaining these splits (ER. 1494).

All of the retailers which utilize its products are subject to an agreement not to compete for their business by reason of the territorial clauses in the consignment agreement. The deliberate use of the variety of devices disclosed in this record should have precluded a summary judgment on the Sherman Act, Section 2 issues.

Pepperidge Farm has successfully obtained permission to carry out a course of conduct always thought impermissible by reason of the Sherman Act. It has shown no tendency not to relentlessly pursue the control of its product although by contract it relinquishes control to third parties whose business judgments are the basis of their success or failure. These petitioners are to be examples of its deep pocket power. The Rule against vertical price fixing prevents the success of its

coercive system of distributor control. If Pepperidge Farm prevails a whole range of price control schemes, heretofore believed closed, will be open to those who seek to avoid the duties owed to employees, but who will control price judgments of independent businessmen.

CONCLUSION

Petitioners are entitled under Simpson to a summary judgment under the Sherman Act, Section 1, on all causes of action raising resale price fixing by consignment. They are entitled to a jury trial on all remaining issues.

Dated: May 27, 1983

Respectfully submitted,

MAXWELL KEITH
Attorney for Petitioners

FILED
JAN. 25, 1983
PHILLIP B. WINBERRY,
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELI MESIROW AND THOMAS MORRIS, Plaintiffs-Appellants, vs. PEPPERIDGE FARM, INC., a Connecticut corporation, Defendant-Appellee.	No.81-4471 (N.D. Cal. No. C-78-1392 MHP) OPINION

Appeal from the United States District Court for the Northern District of California, Honorable Marily Hall Patel, District Judge, Presiding
Argued and Submitted Sept. 14, 1982

Before: DUNIWAY, FLETCHER and BOOCHEVER, Circuit Judges

DUNIWAY, Circuit Judge:

Plaintiffs Eli Mesirow and Thomas Morris appeal from the district court's dismissal on summary judgment of their claims against Pepperidge Farm, Inc., under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They also ask us to review two orders imposing fines on their

counsel during discovery. We affirm the dismissal of the antitrust claims, and decline to review the discovery sanctions for lack of jurisdiction.

I. Facts

Plaintiffs distributed Pepperidge Farm biscuits, cookies and other products from January 1970 to May 1978, and from April 1970 to November 1978, respectively. The terms of the relationship between plaintiffs and Pepperidge were set down in "consignment agreements" that designated the distributors as self-employed independent businesspersons. The agreements established a dual system of accounts for Pepperidge distributors, including plaintiffs: chain stores of three or more retail stores billed directly by Pepperidge, and chain or individual stores that distributors billed. Pepperidge employees regularly visited the stores of its direct-billed accounts to check on service and arrange promotional displays, but distributors

such as plaintiffs actually delivered and installed the Pepperidge Farm products in these stores, as they did in the other stores. In all cases, Pepperidge retained title to the goods until they reached the retailers' shelves. Accordingly, it bore the risk of loss or theft of the goods, even while they were in the hands of the plaintiffs. It also paid applicable inventory and property taxes on the goods.

Both during the relevant Fair Trade period and after, Pepperidge set the wholesale prices to be charged direct-billed customers, which paid Pepperidge directly; plaintiffs were free, however, to solicit these customers to be their own. Plaintiffs set wholesale prices for their own accounts, which included both chain and individual stores. Pepperidge employees did not help on these accounts unless plaintiffs asked them to do so.

Pepperidge gave each of its distributors, including plaintiffs, the exclusive right to solicit and sell to

stores within a specific geograhpical territory. Though distributors were thus prohibited from selling to retailers outside their territories, they were permitted to, and plaintiffs did, within those areas, distribute other manufacturers' goods in addition to Pepperdige's. Distributors paid their own operating costs of deliveries to the customers Pepperidge billed directly as well as to their own customers. In addition, they were required to absorb the cost of products that went stale while sitting in their warehouses or on retailers' shelves in their territories.

Plaintiffs, who are step-brothers, operated their Pepperidge distributorships jointly. They several times "split" their territories by selling to others the right to deliver Pepperidge Farm products within portions of those areas. Pepperidge terminated Mesirow's franchise for cause in May 1978. Morris sold his franchise later that year.

Plaintiffs' complaint alleged that Pepperidge violated §§ 1 and 2 of the Sherman Act both during and after the Fair Trade period, and breached its contracts with plaintiffs. Pepperidge counterclaimed, alleging trademark infringement, breach of contract, fraud and money due on rolling account. On cross motions for summary judgment, the trial court dismissed plaintiffs' antitrust claims, and entered judgment under Fed. R. Civ. P. 54(b). Plaintiffs filed a timely appeal from that judgment. The notice refers only to "the judgment entered pursuant to Fed. R. Civ. P. 54(b) . . . on September 4, 1981."

II. The Antitrust Claims.

A. Pepperidge Farm Accounts: Post-Fair Trade Period.

Plaintiffs first contend that Pepperidge's practice, after the repeal of Fair Trade laws, of fixing the wholesale prices charged its direct-billed customers was a *per se* violation of § 1 of the

Sherman Act as defined by Simpson v. Union Oil Co. of California, 1964, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98. That case held a purported "consignment" arrangement between an oil company and a retailer illegal because it prohibited the retailer from setting its own resale prices for the oil company's product.

Simpson, however, does not outlaw every consignment arrangement. There is "nothing illegal" about a system in which an owner of an article sends it to a dealer who undertakes to sell it only at a price determined by the owner. 377 U.S. at 21. Three factors disinguish the Pepperidge consignment agreement at issue here from the Simpson arrangement: the agreement here set wholesale, not retail prices; Pepperidge, not the plaintiffs, bore the greater burden of risk during the consignment period; and the agreement did not coerce the plaintiffs as the Simpson contract did. We need not decide here whether any of these factors alone would

prevent application of the *Simpson* rule to the consignment agreement here. Together, they bar a finding that the Pepperidge agreement was *per se* illegal.

1. *Wholesale price fixing*.

Simpson was a retailer of the defendant oil company's products. Plaintiffs were wholesale distributors of Pepperidge products. The trial court concluded that *Simpson* "is not a holding that may be extended automatically to the wholesale level," and we have been unable to find express authority to the contrary.

Plaintiffs argue that *Greene v. General Foods Corp.*, 5 Cir. 1975, 517 F. 2d 635, supports the application of *Simpson* to a wholesale distributorship. Plaintiff Greene in that case distributed coffee goods to "large institutional buyers" such as motel chains. *Id*. at 639, 642 n. 4. But the court clearly assumed that he was a retailer, not a wholesaler. *Id*. at 652. We have once considered applying *Simpson* to a contract

between a producer and wholesalers. In Westinghouse Electric Corp. v. CX Processing Laboratories, Inc., 9 Cir., 1975, 523 F. 2d 668, a wholesale distributor alleged per se antitrust violations in the form of vertical price fixing by a manufacturer. Citing Simpson, we affirmed the dismissal of the claim for lack of evidence. 523 F.2d at 674. See also, American Oil Co. v. McMullin, 10 Cir. 1975, 508 F.2d 1345, 1351-1352, affirming a judgment against a bulk distributor of oil products that had charged a producer with Simpson violations. In neither case did the court specifically decide whether Simpson could bar a consignment agreement involving a wholesaler instead of a retailer. Thus, we are not prevented from holding that the wholesale context of the agreement in the case before us is at least a factor in immunizing Pepperidge from Simpson illegality.

Language in Simpson itself supports

such a conclusion. As the trial court noted, the Court in that case repeatedly used the term "resale price maintenance," which is a term of art usually referring to the retail level. At one point, the Court explicitly stated: "Nor does § 1 of the Sherman Act tolerate agreements for retail price maintenance." 377 U.S. at 18 (emphasis added). Plaintiffs attempt to represent the Simpson holding as a ban on "resale pricing," but there is nothing in that opinion, which speaks, e.g., of a "retail merchant," 377 U.S. at 18, and "retail sales," Id. at 21, to directly support its application to wholesalers.

2. Allocation of risk.

Another factor in our decision is the significantly greater risks borne by Pepperidge than were borne by the defendant in Simpson. The Simpson Court reviewed various "indicia of entrepreneurs," 377 U.S. at 20, possessed by the plaintiff there, concluding that Simpson was in fact an independent

businessman burdened illegally by his contract with defendant. Here, however, the risk of entrepreneurship with regard to the direct-billed accounts falls mainly on Pepperidge.

In Simpson, although the defendant paid property taxes on the goods and retained title to them until they were finally sold by the retailer Simpson, the retailer was liable for losses or damage to the product while it was in his possession, and was required to insure against such loss. 377 U.S. at 15. Plaintiffs were not burdened with the risks and responsibilities imposed on Simpson. Title to the baked goods remained with Pepperidge until delivery to a retailer--and so did liability for losses and damage. Pepperidge, not plaintiffs, purchased insurance against such risks. Although plaintiffs, like Simpson, were responsible for their own operating costs and received a commission on deliveries, Pepperidge was liable for

the risk and expense of billing the customers. Plaintiffs make much of their liability for stale goods, a risk that the trial court found to be "beyond the usual consignment responsibility of properly caring for the consigned product." We do not find incorrect her conclusion that as the risk of stales was one peculiarly within plaintiffs' control, it was not sufficient to make the arrangement *per se* illegal.

Plaintiffs' reliance on *Greene v. General Foods Corp.*, *supra*, on this issue is misplaced. The court in that case found that the defendant had engaged in conduct *per se* illegal under *Simpson*, but the agreement's allocation of the risks of the arrangement was far different from the allocation in the Pepperidge agreement. In *Greene*, plaintiff distributor purchased the goods from defendant manufacturer and resold them. 517 F.2d at 640-641. The distributor held title to the goods and bore the risk of loss or damage to them

until they were delivered to his customers. Id. The distributor also was responsible for billing the accounts, although the manufacturer bore the risk of default on credit sales. Id. Finally, the distributor was charged with promoting the goods and performing the day-to-day tasks necessary to maintain customer satisfaction. Id. at 657-658. As we have noted, Pepperidge, in the agreement with plaintiffs, retained title to the consigned goods and bore the risk of loss or damage to them. The goods were consigned to the distributors, not sold the them. The goods were consigned to the distributors, not sold to them. In addition, Pepperidge, not the distributors, promoted the goods to the direct-billed accounts and had the sole responsibility of routinely servicing those accounts. And unlike the plaintiffs in Greene, Pepperidge's distributors were free to solicit the direct-billed accounts to be their own.

3. Coercion.

The third factor that distinguishes the consignment arrangement at issue here from that in Simpson is the absence of coercion in the Pepperidge agreement. Simpson held that "a supplier may not use coercion on its retail outlets to achieve price maintenance. . . . [I]t matters not what the coercive device is." 377 U.S. at 17. The vice of the consignment in issue there was that it "coercively laced [dealers] into an arrangement under which their supplier is able to impose non-competitive prices on thousands of persons whose prices otherwise might be competitive." 377 U.S. at 21. The agreement bound Simpson so tightly that it took from him his "only power" to be a wholly independent businessman--the power to set his retail price. Id.

Plaintiffs are unable to demonstrate such coercion here. The Simpson Court was concerned with preventing a producer from curbing competition among the sellers of a

single brand of product. Here, on the contrary, the evidence shows that Pepperidge distributors were free to solicit the producer's customers to be their own. They were not necessarily bound, therefore, to sell to retailers at prices specified by Pepperidge.

In view of these three factors, therefore, we affirm the trial court's dismissal of plaintiffs' § 1 _per se_ claim covering the post-Fair Trade period.

B. _Pepperidge Farm Accounts: Fair Trade Period_.

Plaintiffs also challenge the legality of Pepperidge's consignment agreements during the Fair Trade period, from June, 1974 through March, 1976. These agreements set the prices at which distributors sold Pepperidge goods to reatilers.

Before 1976, federal law permitted fair trade agreements in which producers set resale prices for their goods. 15 U.S.C. § 1 (relevant part repealed by Pub.

L. 94-145, 89 Stat. 801 (1975)); 15 U.S.C. § 45 (a)(2)-(5) (repealed by Pub. L. 94-145, 89 Stat. 801 (1975)). Plaintiffs, however, argue that the Pepperidge agreements were illegal because they fixed prices horizontally, in violation of 15 U.S.C. §§ 1 and 45(A)(5), which, before the 1975 amendments, prohibited fair trae agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factos, or between retalers, or between persons, firms, or corporations in competition with each other." They contend that when Pepperidge set wholesale prices, it competed with its distributors, "who also had potential to set a wholesale price."

Plaintiffs' contention is not, as they claim, supported by United States v. McKesson & Robbins, Inc., 1956, 351 U.S. 305. The Court in that case held that §§ 1 and 45(a) did not exempt from antitrust prohibitions an agreement between a producer and a distributor who in fact

competed against each other. Defendant manufacturer in McKesson sold goods under Fair Trade agreements both to independent distributors and to retailers. As a wholesaler, it competed directly, therefore, with the independent distributors on whom it imposed price restrictions. Pepperidge, on the other hand, sold only through its distributors, who, as the trial court found, profited from all Pepperidge sales, even those that Pepperidge directly billed.

The trial court also found that Pepperidge did no mail order or retail business in competition with its distributors, and plaintiffs have directed our attention to no evidence to the contrary. Pepperidge therefore did not compete "at the same functional level" with its distributors, McKesson, 351 U.S. at 313. As a result, summary judgment for Pepperidge on the antitrust claim covering the Fair Trade period was proper.

C. Pepperdige Farm Accounts: Interim

Violations.

Plaintiffs complain that the trial court did not respond to their claim that Pepperidge's practice of setting wholesale prices for its direct-billed customers between March 1976, when Fair Trade ended, and May 1977, when Pepperidge consignment agreements were signed, violated § 1 of the Sherman Act. Though the trial court's decision did not discuss the interim allegations specifically, it dismissed them along with plaintiffs' other antitrust claims. We affirm because we find nothing improper in Pepperidge's conduct after the repeal of Fair Trade.

D. Distributors' Accounts.

Plaintiffs argue that although Peppridge claims that distributors were free to set the prices they charged all customers other than those the manufacturer billd directly, Pepperidge used varous methods to render that freedom illusory. For example, they refer to a

type of account they term a "hybrid direct chain account," in which, they say, the distributor billed at prices set by Pepperidge. But plaintiffs' contention that distributors were not free to set prices for their own accounts is set forth only in Mesirow's declaration fled in opposition to Pepperidge's motion to dismiss. It directly contradicts Mesirow's own earlier deposition testimony that he "always" priced products he sold to stores he billed directly at amounts different from any price that Pepperidge might have specified. Mesirow's conflicting statements do not create a fatual dispute sufficient to avoid summary judgment. They raise sham issues. Radobenko v. Automated Equipment Corp., 9 Cir. 1975, 520 F.2d 540, 544.

Plaintiffs also say that Pepperidge sent price lists to distributors' customers as a means of controlling wholesale prices. But the one relevant piece of evidence they submitted is

hearsay, and insufficient to create a genuine factrual dispute because it was not made on personal knowledge. Fed. R. Civ. P. 56(e). Plaintiffs further argue that Pepperidge controlled its distributors' wholesale prices by pre-printing a suggested retail price on the pakcages of its baked goods. But they have not contradicted Pepperidge's showing that retailers could change the pre-printed prices. By itself, the pre-printed price did not violate antitrust restrictions. Bailey's Bakery, Ltd. v. Continental Baking Co., D. Hawaii, 1964, 235 F. Supp. 705, 722, aff'd, 9 Cir., 1968, 401 F.2d 182.

E. § 2 Claims.

Plaintiffs also assign the trial court's dismissal of their claims that Pepperidge monopolized and attempted to monopolize, in violation of § 2 of the Sherman Act as error. They apparently base their § 2 allegations on the price-fixing claims discussed above and on

Pepperidge's practice of encouraging the division of distributors' sale and delivery territories into smaller geographical areas.

1. Monopolization.

Monopoly power in the relevant market is one of the three essential elemens of § 2 monopolization. Forro Precision, Inc. v. International Business Machines Corp., 9 Cir., 1982, 673 F.2d 1045, 1058. The trial court found that Pepperidge was not a dominant factor in the relevant market. Plaintiffs argue that the judge's finding should be overturned because she failed to consider the proper submarkets. But the relevant market is a question of fact, and the trial court's finding should not be overturned unless it is clearly erroneous. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 9 Cir., 1982, 676 F.2d 1291, 1299. We do not find it clearly erroneous.

2. Attempted monopolization.

Specific intent and anticompetitive

conduct are essential elements of a claim of attempted monopolization. Forro,, supra, 673 F.2d at 1059. Here, plaintiffs tried to prove the required specific intent with evidence of Pepperidge's anticompetitive conduct. See id.; California Computer Products, Inc. v. International Business Machines Corp., 9 Cir., 1979, 613 F.2d 727, 736-737. Where there is no proof of market power, however, the conduct to support an inference of specific intent to monopolize should be of a kind clearly threatening to competition or clearly exclusionary. Forro, supra, 673 F.2d at 1059. Plaintiffs' claims fall far short. We disposed of their price-fixing claims above. As to the splits of territory, as the trial court found, they showed only that Pepperidge encouraged its managers to promote such divisions of distributors territories. Pepperidge introduced evidence showing the legitimate intent and effects of such conduct, and plaintiffs

offered no relevant evidence to contradict that conclusion. Their citation to Photovest Corp. v. Fotomat Corp., 7 Cir., 1979, 606 F.2d 704, is not in point because there the franchisor solicited its franchisee's customers for itself. Here, other distributors are the beneficiaries of route splits.

III. Discovery Sanctions.

Finally, plaintiffs ask us to review the discovery sanctions totalling $750 assessed against their counsel. Counsel was ordered to pay $250 in expenses and attorneys' fees following denial of a motion to compel production of documents, and $500 when the trial court denied a request to redepose, after the close of discovery, a Pepperidge employee who had since been discharged from his job.

Leaving aside the question of whether our jurisdiction is proper in view of the fact that plaintiffs' notice of appeal did not mention the discovery sanctions, we lack jurisdiction for another reason. An

order imposing a sanction upon counsel, a non-party, is final and appealable by the person sanctioned, when imposed, Reygo Pacific Corp. v. Johnston Pump Co., 9 Cir., 1982, 680 F.2d 647, 648; Liew v. Breen, 9 Cir., 1981, 640 F.2d 1046, 1048. No such appeal was taken. The order imposing the $250 fine was filed June 23, 1980; the order imposing the $500 fine was filed March 16, 1981. Plaintiffs' notice of appeal was not filed until September 10, 1981. We note that in both Reygo Pacific Corp. and Liew, supra, the appeal was by the non-party who was sanctioned. Assuming, without deciding that the client can appeal from an order imposing a sanction on his attorney, the appeal is too late. Fed. R. App. P. 4(a). Therefore, we lack jurisdiction to consider the validity of the sanctions.

The judgment appealed from is affirmed.

FILED
APRIL 5, 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Mesirow v. Pepperidge Farm, No. 81-4471

BOOCHEVER, Circuit Judge, concurring.

I would not address the issue of whether an attorney in a case may wait until final judgment to appeal sanctions imposed during the earlier course of proceedings. We have permitted attorneys to file appeals within thirty days from the entry of orders imposing such sanctions, Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 648 (9th Cir. 1982); Liew v. Breen, 640 F.2d 1046, 1048 (9th Cir. 1981); until now, we have never ruled on whether the attorney's appeal may also be joined with that of the party at the conclusion of the case. There are strong policy reasons against piece-meal appeals which weigh in favor of encouraging the joinder of the attorney's

appeal with that of his client.[1] I believe, however, that we have no jurisdiction to resolve the issue at this time.

There were multiple claims and counterclaims filed in this case. On September 4, 1981, the trial judge ruled only on plaintiff's antitrust claims and entered judgment under Fed. R. Civ. P. § 54(b) as to those claims alone. Moreover, the notice of appeal refers only to "the judgment entered pursuant to Fed. R. Civ. P. § 54(b) . . . on September 4, 1981." Thus, our jurisdiction is limited to review of those antitrust claims and we have no authority to consider the appeal from imposition of sanctions.

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1 Eastern Maico Distributors, Inc. v. Maico-Fahrezeugfabrick, 658 F.2d 944 (3d Cir. 1981). See also C. Wright, A. Miller, C. Cooper 15 Federal Practice and Procedure, § 3911, 498-99 (1976).

FILED
APRIL 5, 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELI MESIROW and THOMAS MORRIS, Plaintiffs-Appellants,	)	
v.	)	No. 81-4471
PEPPERIDGE FARM, INC., a Connecticut corp. Defendant-Appellee.	)	ORDER

Before: DUNIWAY, FLETCHER and BOOCHEVER,

Circuit Judges

The petition for a rehearing is denied.

FILED
AUGUST 31, 1981

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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ELI MESIROW, THOMAS MORRIS, Plaintiffs vs. PEPPERIDGE FARM, INC., a Connecticut corporation, Defendant.	No. C-78-1392-MHP MEMORANDUM DECISION

This action is before the Court on cross-motions for partial summary judgment and motions in limine. Oral argument was heard on June 19, 1981. Plaintiffs complain against Pepperidge Farm, Inc. for violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C., and for breach of contract. Defendant counterclaims for breach of contract (causes of action 3 and 5), fraud (cause of action 4) and money due on a rolling account (cause of action 6).1/ Plaintiffs seek summary

judgment against defendant on their § 1 antitrust claim and causes of action 4 and 6 of defendant's counterclaim. Defendant in turn seeks summary judgment on plaintiff's antitrust allegations.

Having considered all pleadings, documents and oral argument presented in these cross-motions, the court finds that there remain no genuine disputes of material fact and that summary judgment for defendant is appropriate on the antitrust claims. While the parties manifest disagreement on a number of issues, a careful search of the record reveals that many assertions are not adequately supported by proper evidence or that if a genuine factual dispute exists, it is not over a necessary fact. Further, the court grants summary judgment for plaintiffs on the fraud claim and denies it as to the rolling account allegation.

I. BACKGROUND

Plaintiffs, Mesirow and Morris, distributed Pepperidge Farm products from

January 1970 to May 1978 and from April 1970 to November 1978 respectively. During that time, each plaintiff entered into several "Consignment Agreements" with defendant in which they were designated at self-employed, independent business-persons. During the relevant Fair Trade period, 1974 to January 1976, defendant's contracts with plaintiffs allowed it to set wholesale prices for products distributed by plaintiffs to retailers. Both during the Fair Trade period and after, a dual system of distributor and direct accounts was established. Direct billed accounts were those chain stores (three or more retail stores) for which plaintiffs acted as commissioned delivery-persons. Defendant was responsible for billing the account and received payment directly. Pepperidge Farms employees regularly visited the stores of its chain customers to check on service and arrange promotional displays. Plaintiffs were not to negotiate prices although defendant

asserts that plaintiffs were free to solicit these accounts to be their own.[2] The distributor accounts were chain or individual stores serviced and billed by distributors. Defendant's employees did not provide assistance unless requested to do so by the distributor. According to defendant, plaintiffs were free to negotiate prices with these latter accounts. At all times, plaintiffs were responsible for costs of their business operation, delivery of products, and for servicing grocery shelves of all accounts. Further, they were required to absorb the costs for products that had gone over-code. Defendant retained title to the consigned goods until they were placed on retail shelves. Defendant bore the risk of loss or theft of the goods and paid applicable inventory and property taxes.

II. PLAINTIFFS' SUMMARY JUDGMENT MOTION

Plaintiffs allege unlawful restraint of trade by various means, including

vertical price maintenance, conspiring to restrain trade and reservation of exclusive territories. After considerable effort sorting out counsel's theories of antitrust violations, the court finds that plaintiffs' arguments lack merit and that partial summary judgment for plaintiffs on the antitrust claims should be denied.

Per Se Illegality

The backbone of plaintiffs' motion for summary judgment on the antitrust claims is the assertion of a per se vertical price-fixing violation under the authority of Simpson v. Union Oil Co., 377 U.S. 13, 84 S. Ct. 1051 (1964) and Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), cert. denied, 424 U.S. 942, 96 S. Ct. 1409 (1976).3/ For the reasons set forth below, plaintiffs' per se theory of liability must be rejected.

Simpson v. Union Oil involved a "consignment" agreement providing for defendant Union Oil to set the prices at which plaintiff retailer sold gasoline.

Title to the consigned gasoline remained with Union Oil until sold by consignee. Union Oil paid all property tax on the gasoline in Simpson's possession. By the terms of the agreement, Simpson was required to carry personal liability and property damage insurance and was responsible for loss of the consigned gasoline in his possession. Simpson received a minimum commission and paid all costs of operation. While recognizing the legitimacy of consignment agreements as a risk-of-allocation device, the Court held that when "a 'consignment' device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the 'consignment' an agency. . ." Simpson v. Union Oil, 377 U.S. at 21, 84 S. Ct. at 1057. The Court was particularly concerned that a consignee, selling only defendant's brand of gasoline, would be prevented from controlling the important economic factor

of gasoline prices while being required to accept the risks and responsibilities of an independent business operation. See id. at 21, 84 S. Ct. at 1056-57.

Simpson stands for the proposition that consignment agreements are not to be shielded from application of antitrust principles. Consignment agreements are not to be used to effectuate otherwise improper resale price maintenance. However, the Simpson holding is not as firm or far-reaching as plaintiffs suggest. E.g., see discussion in Greene v. General Foods Corp., 517 F.2d at 652-55.4/ Cf. Hardwick v. Nu-Way Oil Co., Inc., 589 F.2d 806, 809 (5th Cir. 1979); American Oil Co. v. McMullin, 508 F.2d 1345, 1351-52 (10th Cir. 1975). Simpson is not a holding that may be extended automatically to the wholesale level. Simpson was a retailer of gasoline and the Court refers disapprovingly to "resale price maintenance" - a term of art usually referring to the retail level, not to

"resale pricing" as plaintiffs represent. While plaintiffs' attorney may be prescient in discerning the unspoken extent of the Court's concern, this court is unwilling to claim such powers. Plaintiffs' argument on this point is notably deficient in their failure to cite any authority in support of their interpretation.

In addition to the retail-wholesale distinction, the present case involves parties in a significantly different contractual relationship from that in Simpson. Plaintiffs here are not restricted to dealing only in the goods of defendant, but in fact act as distributors for a number of other manufacturers. (Def's App. 2, Mesirow Dep., Tab F, 6:11-22, 9:7-11). While plaintiffs pay most operational expenses of their business, they are not liable for losses of defendant's products even while those products are located in plaintiffs' own warehouse. It is expected that

independent business people cover operational expenses of their business. While plaintiffs were required to absorb the "risk of loss" for stale products, this risk was peculiarly within plaintiffs' control. (Id. Erdelen Dep., Tab D, 79:17-80:15, 92:2-7; id. McGovern Dep., Tab E, 367-68; id. Montreal Dep., Tab G, 112:8-21; id. Morris Dep., Tab I, 100:14-20.) The overwhelming evidence in the record is that loss of revenue from stale products was and should have been less than two percent for distributors throughout the region.5/ (Id. Wilson Dep., Tab K, 35-36, 157-58.) Plaintiffs present evidence that the "volume of stales was high in certain geographic areas where the individual incomes were low." (Plaintiffs' Memorandum of Law in Opposition to Pepperidge Farm's Motion for Summary Judgment, Erdelen Decl., 5:24-25). However this kind of generalization does little to overcome the specific evidence produced by defendant.

Plaintiffs point out that the stale factors of the larger-volume distributors in the area are not included in the record. However, it is incumbent upon plaintiffs to supply that information rather than attempt to support their assertion by an absence of such evidence.

While Greene v. General Foods Corp. presents facts closer to the present case, it is not dispositive. Greene was an independent distributor of defendant's coffee products who also distributed the products of other manufacturers. Unlike in Simpson or the present case, title to all goods passed to Greene at the time he acquired possession. Additionally, Greene bore the risk of loss of those products. Plaintiff's complaint centered around a dual distribution system whereby defendant reserved large institutional accounts (MFSAs) to itself for billing purposes. While Greene solicited and serviced these accounts to the same extent he did his own, he was not free to negotiate his own

price. The MFSA was directed to make its payments to defendant although plaintiff submitted the invoice and received a "delivery allowance" based on the size of the order and credit to his account with defendant for the payments received from the MFSAs.

The court upheld the trial court finding that General Foods' distribution system was a per se price-fixing violation. The court found evidence that defendant had gone far beyond a simple announcement of terms and refusal to deal with non-complying independent distributors still permissible under United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465 (1919). The court noted that Greene was required to shoulder substantially the same risks and responsibilities as he did for his other accounts whose prices he was allowed to negotiate. The court particularly noted that title to the goods passed to Greene at the time he acquired possession. By

way of contrast, the court suggested that because of retaining title to its goods, the defendant in Simpson "had a greater claim to dictate the price to the consuming public." Greene v. General Foods Corp., 517 F.2d at 656-57.

While the distribution system of Pepperidge Farms and of General Foods bear a number of similarities, the distinctions are significant. Plaintiffs in the present case do not acquire title to defendant's goods and are not required to assume the risk of loss. These distinctions are not mere formalities. At one point, plaintiffs reported the loss of a substantial quantity of defendant's goods from their warehouse and were fully credited for the loss.6/ Additionally, defendant bears the risk of non-payment from retailers on the chain-store acounts and is actively involved in the sales process. See Overhead Door Corp. v. Nordpal Corp., 1979-1 Trade Cas. ¶ 62,595 at 77,431 (D. Minn. 1978).

In both Simpson and Greene, the court found that a distribution system involved illegal price-fixing. Plaintiffs seek the same relief here. However each case is distinguishable on its facts, as discussed above. Although the distribution system in Greene bears a resemblance to that of Pepperidge Farms, the Simpson case provides the closest analogy to the precise issue before us here - whether the economic risks and responsibilities established by a "consignment agreement" so alter the basic nature of consignment as to render the agreement susceptible of an illegal resale price fixing allegation. The material facts surrounding the present "consignment agreement" are not in dispute and the court finds as a matter of law that the distribution system at issue is a valid consignment arrangement.

Fair Trade Period

Plaintiffs argue that during the relevant Fair Trade period, 1974-1976, Pepperidge Farm was not entitled to the

protection of the Fair Trade laws, 15 U.S.C. §§ 1, 45; Cal. Bus. & Prof. Code § 16902, because of wholesale price discrimination, retail price-fixing through use of pre-ticketing and engaging in horizontal competition with the independent distributors.

The Court is unpersuaded that plaintiffs' complaint of price discrimination is sufficient to deny defendant the protection of the Fair Trade laws. In <u>General Electric Co. v. Federal Employee's Distributing Co.</u>, 45 Cal.2d 891, 291 P.2d 942 (1955), the court considered a challenge of discriminatory application to fair trade contracts and found that

> parties are left to their discretion as to whether they should enter into fair trade contracts at all, whether they should enter into contracts for the sale of certain commodities and not others, <u>and apparently whether they should enter into contracts for certain sales of the same commodity and not others</u>.

Id. at 894 (emphasis added). The facts of that case involved a company making exceptions to its resale contracts for certain classes of retail purchasers. However the court believes the rationale expressed in General Electric is applicable to the present situation and plaintiffs have submitted no authority to dissuade it from that view. Also see J.W.T., Inc. v. Kobrand Corp., 1973-2 Trade Cas. ¶ 74,7226 at 95,181 (N.D. Ill. 1973).

Plaintiffs are likewise unpersuasive on the wholesale competition claim. Their reliance on United States vs. McKesson & Robbins, Inc., 351 U.S. 305, 76 S. Ct. 937 (1956) is unavailing. In McKesson, defendant employed a multitiered distribution system including sales to retailers from its wholesale division and to independent wholesalers through its manufacturing division. Resale prices in each of these relationships were set by McKesson. Independent wholesalers were in

direct competition with McKesson's own wholesale division and lost economic advantage from defendant's wholesale operations. In the present case, Pepperidge Farm's distribution system is distinguishable in significant respect. While defendant is involved in direct billing of chainstore accounts, the independent distributors participate in the scheme and stand to profit from increased sales.

Contrary to plaintiffs' assertion, defendant does no mail order business in competition with its distributors. Defendant's parent company owns a separate subsidiary mail order company that sells "specialty items," including Pepperidge Farm Cookies, by mail directly to the public. None of these items are sold to wholesalers, distributors or retailers. (Def's App. 2, Tierney Decl., Tab L, ¶ 17.) Plaintiffs do not raise a genuine dispute of fact. They merely reiterate the facts put forth by defendant and state

that these facts raise the question of "whether Pepperidge Farm operates a mail order business." (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, ¶ 17.)

Plaintiffs' attempt to show horizontal competition is rejected. There is no evidence that Pepperidge Farm had a wholesale division set up to service and coordinate distribution and sales to retailers as existed in McKesson. Plaintiffs and defendant do not stand at the same " 'functional level' as one another, see United States v. McKesson & Robbins, Inc., 351 U.S. at 313, 76 S. Ct. at 942, and there is not showing of vertical integration. See Westpoint Pepperell, Inc. v Rea, 1980-2 Trade Cas. ¶ 63,341 (N.D. Cal. 1980). See generally Altschuler, "Sylvania, vertical restraints, and dual distribution," 25 Antitrust Bull. 1 (1980).

Rolling Account

Plaintiffs' motion for summary judgment on cause of action six of defendant's counterclaim is denied. Mr. Tierney may have believed that the $30,000 received by defendant for sale of Mesirow's territory was to be credited to plaintiff's account. (Plaintiffs' Motion for Partial Summary Judgment (1/19/81), Tierney Dep.)). However, assuming that Mr. Mesirow's distributorship was terminated with good cause and without improper motive, he no longer had a legal interest in the sale of the territory. See Noble v. McClatchy Newspapers, 533 F.2d 1081 (9th Cir. 1975), remanded on other grounds, 433 U.S. 904, 97 S. Ct. 2966 (1977). If the agreement between plaintiffs and Pepperidge Farm was to credit the franchise sale price to plaintiffs' account, that remains to be shown at trial. Plaintiffs' showing on this part of the motion is insufficient. Exhibit 4, of Plaintiffs' Motion for

Partial Summary Judgment has not been properly authenticated and does not specify what time period is affected.

Fraud

Plaintiffs have attempted to show that the reliance element of a cause of action for fraud cannot be shown by defendant. Defendant did not dispute plaintiffs' argument and it is therefore accepted as true by the court for purposes of this motion. Plaintiffs' motion on cause of action four of defendant's counterclaim is granted.8/

III. DEFENDANT'S SUMMARY JUDGMENT MOTION

Defendant asserts that as to the post-Fair Trade period, (1) maintaining direct accounts with established prices was not illegal price-fixing, and (2) that it did not impermissibly coerce distributors or their accounts to adhere to fixed prices. The court agrees with defendant on both issues and therefore grants summary judgment in its favor on the antitrust claims. While summary judgment

is not a favored vehicle for resolution of antitrust allegations, its use is not foreclosed and can be "a valuable means to avoid squandering judicial time and resources." Mutual Fund Investors, Inc. v. Putnam Management Co., Inc., 553 F.2d 620, 622 (9th Cir. 1977). It is the responsibility of plaintiffs to set forth facts that will support a viable legal theory upon which it can recover. They have failed to do so upon any version of the facts before this court even when reviewed most favorably to them.

Direct Accounts

A manufacturer bearing the economic risks of distributing is permitted to control the resale price of its products without running afoul of price-fixing prohibitions. See Greene v. General Foods Corp., supra; Overhead Door Corp. v. Nordpal Corp., supra; Hardin v. Houston Chronicle Publ. Co., 434 F. Supp. 54 (S.D. Tex. 1977), aff'd per curiam, 572 F.2d 1106 (5th Cir. 1978). The issue here is

whether Pepperidge Farm in practical effect bears the economic risks of distribution or whether a significant share of those risks lie with plaintiffs.

The essentially undisputed facts are that, as to Pepperidge Farm's direct accounts, distributors delivered products, serviced the shelves, and took orders for the direct account customers. (Def's App. 2, Bonesteel Dep., Tab A, 33:7-15). Pepperidge Farm employees also call upon these customers in order to promote sales and arrange for displays. These accounts are billed directly by defendant; distributors receive a percentage of defendant's wholesale prices as a commission. Pepperidge Farm bears the risk and expense of billing the direct customers. (See discussion infra.) Chains may choose to require direct billing. (Id. Carhuff Dep., Tab. B, 185-86.

While the distributor's role here involves greater participation than in

some of the cases cited by defendant, plaintiffs have failed to articulate any specific economic risks they are forced to bear as a result of the direct-account distribution system. The risk of stale products is a risk beyond the usual consignment responsibility of properly caring for the consigned product. However, as mentioned earlier, this responsibility does not create the kind of economic risk associated with a finding of impermissible price controls.

Distributor Accounts

Plaintiffs argue that although they should have been able to negotiate their own prices on the distributor accounts, in fact defendant used various methods to render this freedom illusory. Defendant relies on the factual record to show that no coercive tactics were employed. Plaintiffs agrue that at the least, material questions of fact remain for trial. Keeping in mind the restricted role of summary disposition, the court is

unable to find genuine issues of material fact. On close examination, much of plaintiffs' record can be reduced to unsupported assertions, improper attempts to alter or ignore sworn deposition testimony, or factual distinctions without substantive impact. Particularly, the court finds that plaintiffs failed to controvert defendant's showing of permissible conduct. Defendant provides evidence that its policy was to stop directing wholesale prices to distributor accounts after 1976. (Def's App. 2, Dundon Dep., Tab C, 216:20-218:20; id. Mesirow Dep., Tab F, 425:19-426:6.) Plaintiffs have not produced legally sufficient evidence from which the court can find a pattern of coercion in the setting of wholesale prices. See Mutual Fund Investors, Inc. v. Putnam Management Co., Inc., supra, 553 F.2d 620; Westpoint Pepperell, Inc. v. Rea, 1980-2 Trade Cas. at 75,744.

Plaintiffs rely heavily on their assertion that Pepperidge Farm sent price lists to distributor chain accounts as a means of controlling wholesale prices. In support of this claim, plaintiffs submit one piece of hearsay testimony. (Def's App. 2, Mesirow Dep., Tab F, 426:7-22.) This evidence is not sufficient to create a genuine factual dispute against the showing by defendant that the policy and practice of Pepperidge Farm was to send such lists only to its direct chain accounts. (Id. Dundon Dep., Tab C, 283:8-27.) One former district sales manager stated that from 1968 to 1971 he delivered Pepperidge Farm price lists to non-chain accounts "when requested." (Decl. Montreal in Support of Plaintiffs' Motion for Summary Judgment, 6:27-30.) Again, such an assertion is vague and not relevant to claims arising between 1974 and 1979.

Even assuming that such evidence was sufficient, plaintiffs admit that they

never attempted to charge Long's a price different from that used by Pepperidge Farm for its direct accounts. (Mesirow Dep., supra, Tab F, 421:18-422:4.) Plaintiffs have made no showing that the price negotiations between plaintiffs and its own chain accounts were not the result of those parties' respective bargaining power.

As to the pre-ticketing allegation, defendant has submitted evidence that in spite of its practice of pre-ticketing its products, retailers may initiate a change in prices. (Def's App. 2, Morris Dep., Tab I, 133:1-12, id., Tab J, Tierney Dep., 385-86; id., affidavits of defendant distributors, Tabs R-CC, ¶ 7.) Plaintiffs have submitted no proper evidence to contradict defendant's showing and thus there is no genuine issue of fact.9/

Distributor Territories

Plaintiffs argue both that defendant impermissibly required exclusive territories and that it coerced

distributors to split their routes in order to maintain price controls.

Territorial restraints must be judged under a rule of reason as to whether they create a substantially adverse effect on interbrand competition in the relevant market. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856 (1967); Cowley v. Braden Industries, Inc., 613 F.2d 751 (9th cir.), cert. denied, 446 U.S. 965, 100 S. Ct. 2942 (1980).

In Cowley v. Braden Industries, the court upheld the trial court's findings that defendant's near-exclusive territory restrictions did not harm interbrand competition. Id. at 755. Defendant represented approximately 70% of the nation's windmill market. The appellate court held that plaintiff failed to meet its burden of proving that defendant's vertical territorial restriction was

unreasonable. As in Cowley, defendant has submitted evidence that requiring exclusive territories was necessary for assuring active interbrand competition. (Def's App. 2, Tierney Decl., Tab L, ¶ 8.) Defendant bolsters its argument of encouraging competition by presenting evidence that plaintiffs preferred to acquire exclusive territories. (Def's App. 2, Mesirow Decl., Tab F, 17:27-18:7, 725-21-25.) While the legality of territorial restrictions does not depend on whether the restriction is initially attractive to distributors, the preference of plaintiffs for exclusivity does lend support to defendant's claim that such restrictions improved defendant's (and distributors') position in the relevant market. The desire to obtain and maintain an exclusive distributorship is a legitimate goal and does not, without more of a showing, suggest any forbidden anticompetitive motive. See Westpoint

Pepperell, Inc. v. Rea, 1980-2 Trade Cas. at 75,744.

Plaintiff relies solely on Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970) for its argument that Pepperidge Farm's dominant market position requires denial of defendant's motion for partial summary judgment. In Industrial Building Materials, defendant, a dominant manufacturer of sealing products, was accused of driving plaintiff out of business through unlawful means including distribution of its own products. The court relied heavily on the fact that even if defendant did not hold a monopoly position in the sealant industry, it was at least a strongly dominant factor.

Defendant here asserts that its United States market share for biscuit products (cookies and crackers) is between three and four percent.10/ Plaintiffs object to the inclusion of crackers in the definition and percentage calculation of

the relevant product market. (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, 3:23-27.) However they offer no evidence to support this claim or statistics showing defendant's percent of the cookie market. Plaintiffs contend that Pepperidge Farm is a monopoly or dominant power in the "premium cookie industry." (Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exh. 1, Patch Dep., 60:7-20.)[11/] The distinction between cookies "made with top quality ingredients" and cookies of more pedestrian quality may be susceptible of subjective taste but it is not susceptible of objective evaluation. The relevant market is not to be defined by advertising slogans and plaintiffs have submitted no authorities to help in this process. For instance there is no attempt to show that this distinction falls outside the standard of "commodities reasonably interchangeable by consumers for the same purposes . . ."

ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 56 (9th Cir. 1975), citing United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 1007 (1956).

In Industrial Building Materials, defendant clearly held a dominant market position and was alleged to have driven its major independent distributor out of business. The court noted that this combination of factors resulted in a foreclosure of competition and was an unreasonable restraint of trade. Industrial Building Materials, 437 F.2d at 1342-43. We are not faced here with the special circumstances of that case. There is no evidence that Pepperidge Farm is a dominant factor in the relevant market; there is no allegation that defendant planned to reduce competition by eliminating distributors; and defendant did not engage in horizontal competition as a means of driving its major distributor out of business. "The intent

of [defendant] is not at issue. Rather the issue is whether plaintiff has alleged any facts demonstrating a violation that "fits" within the requirements for an antitrust recovery, a question of law that can be answered by the court." Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1166 (7th Cir. 1978), cert. denied, 440 U.S. 982, 99 S. Ct. 1791 (1979).

Pepperidge Farm admits that its economic interests are served not only by an increase in sales of its products, brought about by route expansion, but also by quality service to existing accounts, sometimes brought about by route splitting. Plaintiffs argue that defendant impermissibly encouraged route splits to prevent the formation of powerful distributors and to maintain control over resale prices. Evidence presented by plaintiffs to demonstrate improper motive shows only that defendant encouraged its managers to induce route splits. (Plaintiffs' Opposition to

Defendant's Motion for Partial Summary Judgment, Exh. 6, Montreal Dep., 49-57, 78-79; id., Erdelen Decl., 2:16-20, 7:16-29.) Defendant provides support for its assertion that suggesting or encouraging route splits was done for the legitimate purpose of improving service. (Def's App. 2, Dundon Dep., Tab C, 307:18-308:19, 315:19-316:16; id., Tierney Dep., Tab J, 267.) Alleging improper motives is not by itself sufficient to raise a genuine dispute of fact or to adequately support a reasonable inference in plaintiffs' favor. There is a deposition testimony from a former Pepperidge Farm territorial sales manager (whose position with defendant is not properly established in plaintiffs' exhibit) that pressure was put on him to get a route split from one of the distributors because the distributor was becoming "too successful." (Montreal Dep., Exh. 6, supra, 51-56, 61-66.) However this incident occurred in 1970 and

the same deponent testified that such conduct was exceptional. Mr. Montreal reiterated the testimony of others that the major concern in route splits was encouraging distributors to improve service.

While the burden of proof is not on plaintiffs to demonstrate the existence of a material issue of fact, once defendant has made a showing of understandable and legitimate business practices, plaintiffs must come forward with specific facts showing that there remains a genuine issue for trial. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90, 88 S. Ct. 1575, 1592-93 (1968); Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 672 (9th Cir. 1980). This they have not done after ample opportunity to do so but have relied on a record lacking significant probative evidence to support their factual contentions or connect these contentions to plausible legal theories.

Section 2 Claim

The elements of a § 2 claim for attempt to monopolize are "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., slip. op. 3917 (9th Cir. Aug. 7, 1981). Although defendant's motion on the § 2 claim could have been more clearly enunciated in its moving papers, the record is sufficient to dispose of this claim as well. Plaintiffs rely on the substantive allegations of their § 1 claim to demonstrate predatory or anticompetitive conduct. The court's findings with regard to the § 1 claim apply to the § 2 claim and lead to the conclusion that anticompetitive conduct has not been shown. Additionally, while not indispensable, market power is a

relevant factor in determining probability of success. Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d at 669. As discussed earlier, plaintiffs' unsupported assertions do not withstand summary disposition of that issue. Even under the "short-cut method" of this circuit enunciated in Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1280 (1979), plaintiffs would need to present sufficient evidence of predatory conduct. Plaintiffs having failed in this showing, the court finds that no purpose would be served by going to trial on the § 2 claim and therefore grants summary judgment to defendant on plaintiffs' allegation of attempt to monopolize trade.12/

For all of the above reasons, the court denies plaintiffs' motion for summary judgment on the antitrust claims and the rolling account, and grants the motion as to the fraud claim. Further,

the court grants summary judgment to defendant on the various antitrust claims. Parties are to prepare for trial only on the breaches of contract and rolling accounts claims.

Dated: 31 AUG 1981

/s/

MARILYN HALL PATEL

United States District Court Judge

FOOTNOTES

1/ Defendant's first two causes of action relating to trademark infringement have been dismissed without prejudice.

2/ While this point is disputed by plaintiffs, they offer no evidence to support their position. Long's Drug Stores and Payless Drugs are examples of "chain" stores that remained distributor accounts. (Def's App. 2, Tierney Decl., Tab L, ¶ 15; id. Mesirow Dep., Tab F, 415:10-416:14.)

3/ Attorney for plaintiffs has had great difficulty clarifying his antitrust claims. The court is preceding on its assumption of what the claims are meant to be. However it is the responsibility of plaintiffs to clearly articulate their claims and set forth in a comprehensible fashion the facts in support. It is not the court's responsibility to create a comprehensible claim out of chaos -- a predicament in which another court apparently found itself. Zoslaw v. Columbia Broadcasting System, Inc., 1978-2 Trade Cas. ¶ 62,269 (N.D. Cal. 1978).

4/ The court in Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), cert. denied, 424 U.S. 942, 96 S. Ct. 1409 (1976) interpreted Simpson v. Union Oil Co., 377 U.S. 13, 84 S. Ct. 1051 (1964) as prohibiting devices resulting in resale price maintenance "where the risks of the distribution process are borne largely by numerous otherwise independent individuals or firms in competition with each other in a product for which there is a widespread demand on the level of the individual consumer." Greene v. General Foods Corp., 517 F.2d at 653. The Greene court found substantial support for its interpretation in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856 (1967) in

which the court upheld a finding of per se Sherman Act violations in a vertical territorial restriction scheme. However, the vitality of this suggested trend is seriously undermined by the return to the rule of reason standard enunciated in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549 (1977).

5/ It is difficult to escape the conclusion that plaintiffs' lax business methods did little to reduce the possibility of goods going stale on the shelf. (Def's App. 2, Mesirow Dep., Tab F, 343:20-344:15, 404:22-405:2, 518:28-519:11, 618:1-5; id. Morris Dep., Tab I, 86:28-87:12.)

6/ In 1975, plaintiffs reported a loss of and received credit for goods worth $21,386.88. Pepperidge Farms recouped approximately half this amount from their insurer. (Def's App. 2, Silk Decl., Tab O, ¶ 3.)

7/ Therefore the only sale that takes place is between defendant and the retailers and the transactions between defendant and distributors does not involve resale pricing. See Overhead Door Corp. v. Nordpal Corp., 1979-1 Trade Cas. ¶ 62,595 at 77,431 (D. Minn. 1978).

8/ Plaintiffs have filed two motions in limine. Portions of the 1978 Reny Morris deposition are prejudicial to plaintiffs within the meaning of Fed. R. Evid. 403. However none of the information contained in the deposition is relevant to the issues in this case. This is especiallly so because plaintiffs' motion for summary judgment on the fraud claim has been granted by the court.

Plaintiffs' motion in limine as to the Dutch Boy Cookies is rendered moot by the

court's decision not to address the damages issue.

9/ It is not inconceivable that such evidence does exist somewhere in the record. But after a more-than-diligent search, the court is unable to discern any. As with many evidentiary issues in this action, plaintiffs' papers are a jumble of incomplete cross-references and unsupported assertions. For instance, plaintiffs' attorney states "Pepperidge Farm's pre-printed retail prices are not sulggested at all, but are firmly in place printed prices whiclh establish a ceiling on a distributor's abililty to negotiate prices and profit margins with retailers." (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, 14:7-10.) Such an assertion fails to meet the most minimum standard for presenting proper evidence to raise a disputed issue of fact on a motion for summary judgment.

10/ In 1980, defendant's share of the U.S. biscuit market was 3.64%; its share of the San Francisco market was 3.2%. The respective 1975 shares were less than 3% and less than 2.5%. (Def's App. 2, Tierney Decl., Tab L. ¶ 7.)

11/ Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, states "[i]t is further demonstrated that Pepperidge Farm is a dominant company in the sale of dessert and party cookies, as distinguished from crackers. See, Declaration of Maxwell Keith, Exh. 1 herein." Aside from the fact that "Exh. 1 herein" is inexcusably imprecise, this factual assertion simply distorts and exaggerates the testimony of one Safeway manager (taken in Utah) that to his knowledge Pepperidge Farm is the only company that makes a "premium" cookie. It appears that the deponent worked at a San Francisco Safeway division between 1972

and 1975 but no proper foundation was laid clarifying that point.

12/ Because the court has determined that no anticompetitive behavior has been shown, it is unnecessary to decide the issue of damages and the court declines to do so.

SHERMAN ANTITRUST ACT

Act of July 2, 1890, c. 647,26
Stat. 209; 15 U.S.C. §§1, 2,
August 17, 1937, 50 Stat. 693,
July 7, 1955, 69 Stat. 282

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label of container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State,

Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this tited: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment

not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding year, or by both said punishments, in the discretion of the court.

Sections 1 of the Sherman Act, as amended December 4, 1974, 88 Stat. 1708; December 12, 1975, 89 Stat 801, to delete the two provisions granting antitrust exemption to State fair trade laws effective ninety days from December 12, 1975; see Appendix G herein, has provided since December 14, 1975, as follows:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. 2, as amended December 21, 1974, 88 Stat. 1708.

Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of

a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act

Oct. 15, 1914, 38 Stat. 731;

15 U.S.C. §15

provided until Sept ~~Spet.~~ 12, 1980:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

THE McGUIRE AMENDMENT TO
SECTION 5(a) OF THE FEDERAL
TRADE COMMISSION ACT,
July 14, 1952, 66 Stat. 631
(repealed Dec. 12, 1975,
effective March 11, 1976)

Section 5(a) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label of container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to

intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

CONSUMER GOODS PRICING ACT OF 1975

Act of December 12, 1975, 89 Stat. 801, Effective March 11, 1976:

AN ACT

To amend the Sherman Antitrust Act to provide lower prices for consumers.

Be it enected by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Goods Pricing Act of 1975".

Section 2. Section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1), is amended by striking out the colon preceding the first proviso in the first sentence and all that follows down through the end of such sentence and inserting in lieu thereof a period.

Section 3. Paragraphs (2) through (5) of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) are repealed and paragraph (6) of such section 5(a) is redesignated as paragraph (2).

Section 4. The amendents made by sections 2 and 3 of this Act shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act.

PEPPERIDGE FARM

CONSIGNMENT AGREEMENT

* * *

Pepperidge Farm, Incorporated
of Norwalk, Connecticut

HEREBY GRANTS

AN

EXCLUSIVE FRANCHISE

TO

Name: ELI ALBERT MESIROW

Address: 809 Seminole Drive,
Livermore, California

AS A

CONSIGNEE

within the territory and upon the
terms stated in the following pages.

DEFINITIONS

(a) BAKERY - refers to PEPPERIDGE FARM, INCORPORATED, the grantor of this franchise, a Connecticut corporation having its principal office in Norwalk, Connecticut.

(b) CONSIGNEE - refers to the grantee of this francise.

(c) TERRITORY - refers to the territory described in Schedule A hereto.

(d) CONSIGNED PRODUCTS - refers to those products listed in Schedule B hereto (subject to modification per Paragraph 10) but only when packaged or wrapped under the brand name "Papperidge Farm" and sold or intended to be sold to retail stores as fresh (i.e. not preserved or stale), first quality (i.e. not seconds) merchandise and does not include (a) any of such products sold, or intended to be sold, to retail stores frozen, canned, or otherwise preserved, (b) stale products, (c) seconds, or (d) merchandise of others

containing Consigned Products as components.

(e) STALE PRODUCTS - refers to Consigned Products whose shelf life has expired, as determined by the Bakery's stale policy existing from time to time.

(f) SECONDS - refers to Consigned Products which do not meet the high standards required by the Bakery for distribution in the ordinary manner and thus are deemed by the Bakery, in its sole discretion, to be unsuitable for that purpose.

(g) DISTRIBUTION OR DISTRIBUTE - refers to the sale and delivery of Consigned Products to retail stores within the teritory and to such hotels, restaurants, etc, as may be authorized by the Bakery per Paragraph 9.

TERMS

1. EXCLUSIVENESS OF FRANCHISE. The Consignee will have the exclusive right to distribute Consigned Products to retail

stores within the territory, and the Bakery will not sell or deliver or authorize any others to sell or deliver the same products to retail stores within the territory except in connection with temporary sales programs; provided, however, that the Bakery will have the exclusive right to distribute Consigned Products to retail facilities woned or operated by the Bakery or by any corporation controlled by the Bakery. The terms of this paragraph are subject, however, to the terms of Paragraphs 6, 7 and 9.

2. QUANTITIES CONSIGNED. Bakery will consign and deliver to Consignee and consignee will accept sufficient quantities of Consigned Products to maintain at all times an adequate and fresh supply thereof in all retail stores in the territory which requests such products and whose accounts are not demonstrably unprofitable; provided, however, that Bakery reserves the right to

allocate its products as nearly proportionately as practicable if the overall demand for its products exceeds its production. Consignee shall hold and care for all Consigned Products as the sole and exclusive property of Bakery. Title to all Consigned Products shall be vested in, subject to, and under the control of Bakery until sold by Consignee.

3. PROCEEDS AND RECORDS OF SALES. The Consignee will pay promptly each week on the day specified by the Bakery for all Consigned Products sold by him during the preceding week. If any chain store organization refuses to pay or to permit its store managers to pay the Consignee directly for Consigned Products distributed by him and, instead, requires the Bakery to submit a consolidated bill to a central or district office of such chain, the Consignee shall be entitled to deliver to the Bakery for credit to his account all charge tickets signed by such store managers; provided, however, that

the Bakery may in its discretion (a) refuse such credit on any charge ticket not received by the Bakery within the time prescribed in its published billing schedule then in effect and (b) debit the Consignee's account with any charge ticket which it is unable to collect within a reasonable time. Consignee guarantees the payment of all bills and accounts for Consigned Products sold by Consignee under this agreement. Consignee will keep such records of Consigned Products received and sales made as Bakery may from time to time request; Bakery may inspect such records and Consigned Products at such times as Bakery may select. Without limiting the generality of the foregoing, Consignee agrees that Bakery may take physical inventory of Consigned Products in Consignee's possession whenever and as often as Bakery desires such to be advisable, and that Consignee will keep such records of his operation and will

furnish Bakery such copies thereof as Bakery may reasonably require.

4. DISTRIBUTION EFFORTS. The Consignee will use his best efforts to realize the full sales potential of the territory for Consigned Products. To this end, he will (a) actively solicit all retail stores whose accounts can be profitably handled, (b) use his best efforts to maintain at all times an adequate and fresh supply of consigned Products in all such stores, (c) co-operate with the Bakery in the effective utilization of the Bakery's advertising and sales-promotion programs and (d) keep fully informed of the Bakery's recommendations of policies and methods for increasing sales and improving distribution service.

5. DISTRIBUTION SERVICE AND FACILITIES. The Consignee will maintain efficient distribution service throughout the territory in keeping with the established reputation of the Bakery and

the high quality of its products. To this end, he will (a) provide adequate facilities and equipment for the receipt, handling and delivery of Consigned Products, (b) comply with all applicable health and sanitary laws and regulations and (c) maintain such route books and other records as are required by Bakery from time to time.

6. EMERGENCY SERVICE. If, by reason of illness or vacation or any other cause, the Consignee shall be unable at any time to maintain the efficient distribution service contemplated by this agreement, he will make other suitable arrangements at his own expense for the maintenance of such service; but, if he is unable or fails to do so, the Bakery is authorized in its discretion to provide such service as his agent and at his expense and risk. Upon the request of the Consignee, the Bakery will endeavor in any emergency to provide such service as his agent and at his expense and risk.

7. FAILURE TO SERVE PARTICULAR STORES. If the Consignee fails for any reason to maintain satisfactory distribution service to any retail store within the territory and such failure is not remedied within five days after written notice therof from the Bakery, the Bakery may make other arrangements, on either a permanent or temporary basis in the discretion of the Bakery, for the service of such store.

8. CHAIN STORE ACCOUNTS. If any chain store orgainzation requires that authorization for the distribution of Consigned Products to the chain's retail stores in the territory shall be obtained through a central or district office located outside of the territory, or only in conjunction with the distribution of Consigned Products to its retail stores in other territories, the Bakery will co-operate with the Consignee in procuring such authorization. If any chain store organization refuses to pay or to permit

its store managers to pay any Consignee directly for Consigned Products and, intead, requires the submission of a consolidated bill to central or district office of the chain, the Bakery will handle the billing and the collections for all such products, subject to the terms of Paragraph 3.

9. PROHIBITED SALES AND DELIVERIES. The Consignee will not sell or deliver any Consigned Products directly to consumers or to any other purchasers except retail stores within the territory and such hotels, restaurants, clubs and similar orgainzations within the territory as the Bakery may authorize in writing. Also, the Consignee will not, without like authorization, make deliveries of Consigned Products to any chain store organization via a central or district warehouse or in any manner other than directly to its retail stores. If, despite the best efforts of the Consignee and the Bakery to obtain permission from

any chain to make deliveries directly to its retail stores, such chain refuses to handle Consigned Products except via warehouse deliveries, the Bakery shall have the right in its discretion to sell and deliver its products directly to such chain for its own account via warehouse deliveries as long as such refusal remains in effect.

10. MODIFICATION OF LIST OF PRODUCTS. The list of Consigned Products set forth in Schedule B hereto may be modified or changed by the Bakery from time to time by (a) adding such other products as it may deem advisable among those which it now or hereafter produces, (b) withdrawing any products (whether originally listed or subsequently added) which it discontinues producing or selling or (c) adding or withdrawing at any time with or without notice and for any reason any product designated as "test product," "for market test" or the like. In addition, the Bakery shall have the right

from time to time to change the ingredients, the method of production or the labelling or packaging of any Consigned Products.

11. RESALE PRICES. To the extent permitted by law, the Bakery reserves the right to fix prices for its products from time to time and to require the Consignee and his customers to maintain the prices so fixed. If the Bakery decides to exercise such right, it will give to the Consignee reasonable notice with respect to the date on which the exercise will take effect. On or before the effective date, the Consignee will execute the deliver to the Bakery, and will cause his customers to execute and deliver to him or to the Bakery, such agreements and other documents as the Bakery may reasonably require and will perform and cause his customers to perform any and all acts and things deemed advisable by the Bakery in the exercise of such right.

12. SALES DATA. The Consignee will furnish to the Bakery such sales data as it may reasonably require for the planning of its production schedules, the expansion of its operations and the planning and conduct of sales promotion programs.

13. TRADE NAME, ETC. The Consignee may use the Bakery's trade name, trademark and distinguishing colors on his trucks and other equipment and supplies; provided, however, that (a) the Bakery's trade name may not be used as a part of any business name or trade name of the Consignee without the written consent of the Bakery or in any other way which will tend to confuse the separate identities of the Bakery and the Consignee, and (b) the Bakery shall have the right at any time to revoke the permission granted in this paragraph if, in its opinion, the general appearance of the Consignee's trucks or other equipment or his own general appearance or deportment or that of his helper or helpers, if any, shall fall

below standards in keeping with the established reputation of the Bakery and the high quality of its products.

14. NON-PERFORMANCE FOR REASONS BEYOND CONTROL. Neither the Bakery nor the Consignee shall be liable for any failure to comply with the terms of this agreement if such failure shall have been caused primarily by fire, labor dispute, strike, war, insurrection, governmental restriction or any other cause beyond the control of the party so failing.

15. INDEPENDENT BUSINESSMAN. The Consignee is a self-employed independent businessman, not an agent or employee of the Bakery, and has no authority other than to sell products consigned to him hereunder, express or implied, to do or perform any act or thing or to make any warranty or representation or promise or commitment of any character which will be binding upon the Bakery or for which it will be responsible, and he will refrain

from any conduct inconsistent with the terms of this paragraph.

16. LIEN OF BAKERY ON FRANCHISE. The Bakery shall have a first lien on this franchise as security for all indebtedness of the Consignee to the Bakery at any time outstanding. Any sale, transfer or assignment of this franchise (invalid per Paragrah 17 without the written approval of the Bakery) shall be subject to such lien unless such lien shall be expressly released by the Bakery in writing.

17. SALE OF FRANCHISE. Subject to the terms of Paragraph 16, this franchise may be sold by the Consignee as a whole at any time with the written approval of the Bakery, and the Bakery will grant such approval with respect to a proposed sale if the purchaser meets the requirements of the Bakery as to character, ability, financial responsibility and adequate facilities. In addition, this franchise may be sold in part on similar terms and conditions if the Bakery also gives its

written approval to the division of territory sought to be effected thereby. The Bakery will notify the Consignee with reasonable promptness of its approval or disapproval of any proposed purchaser and, if applicable, of any proposed division of the territory. Any transaction or instrument which purports purchaser and, if applicable, of any proposed division of the territory. Any transaction or instrument which purports to constitute a sale, transfer or assignment of this franchise as a whole or in part without such written approval shall be void. Any valid sale of this franchise as a whole shall operate to release the Consignee from all obligations to the Bakery hereunder except the obligation to pay in full any adverse balance in his account with the Bakery, and the Bakery shall have the right in its discretion to require the purchaser to accept a new consignment agreement in substantially the same form, except for a description of the territory

in the case of a sale of a part of the franchise, in lieu of continuing this agreement in effect in whole or in part on an assigned basis.

18. TERMINATION OF CONSIGNMENT AGREEMENT FOR CAUSE. The Bakery shall have the right in its discretion to terminate this agreement at any time, upon written notice to the Consignee, for any of the following causes:

(a) failure of the Consignee adequately to realize the sales potential of the territory and his failure to make satisfactory improvement within thirty days after notice of inadequacy from the Bakery.

(b) failure of the Consignee to perform or comply with any other material term of this agreement and the continuance of such failure for seven days after written notice thereof from the Bakery,

(c) failure of the Consignee to maintain the general appearance and condition of his trucks or other equipment

or his own general appearance or deportment or that of his helper or helpers, if any, in accordance with standards in keeping with the established reputation of the Bakery and the high quality of its products and the continuance of such failure for more than five days after written notice therof from the Bakery, or repeated failures of such character even though a previous failure or failures have been temporarily corrected after notice,

(d) any dishonesty of the Consignee in his dealings with the Bakery or with others in connection with his distribution services under this agreement,

(e) the Consignee's insolvency or admission in writing of his inability to pay his debts as they mature,

(f) the filing of a voluntary bankruptcy petition by the Consignee or his failure to vacate an involuntary bankruptcy petition within sixty days after date of filing,

(g) failure of the Consignee to vacate the appointment of a receiver or trustee of his business or assets within sixty days after the date of appointment, or

(h) a general assignment by the Consignee for the benefit of his creditors.

Termination pursuant to this paragraph shall operate to release all rights and obligations hereunder of both the Bakery and the Consignee except the right to receive any favorable balances and the obligation to pay any adverse balances.

19. TERMINATION OF CONSIGNMENT AGREEMENT WITHOUT CAUSE. The Bakery shall have the right in its discretion to terminate this agreement at any time without cause upon written notice to the Consignee. Upon termination pursuant to this paragraph the Bakery will pay to the Consignee a sum equal to the fair market value of this franchise on the termination date plus 25% of such value, such value to

be determined either by agreement between the Bakery and the Consignee or, if they shall be unable to agree, by three arbitrators, one of whom shall be chosen by the Bakery and one by the Consignee and the third by the two first chosen. The determination of fair market value by a majority of the three arbitrators shall be final and binding upon both the Bakery and the rights and obligations hereunder of both the Bakery and the Consignee except (a) the right to receive any favorable balances and the obligation to pay any adverse balances and (b) the rights and obligations with respect to payment and arbitration stated in this paragraph.

20. TERMINATION OF CONSIGNMENT AGREEMENT BY CONSIGNEE. The Consignee shall have the right in his discretion to terminate this agreement at any time upon thirty days' written notice to the Bakery. Termination pursuant to this paragraph shall operate to release all rights and obligations hereunder of both

the Bakery and the Consignee except the right to receive any favorable balances and the obligation to pay any adverse balances.

21. DEATH OF CONSIGNEE. In case of the Consignee's death, all the terms of this agreement (see particularly Paragraph 6) shall continue in effect during the next 90 days, and shall inure to the benefit of and be binding upon the legal representatives of his estate during such period. If the legal representatives of the Consignee's estate shall not have sold this franchise pursuant to Paragraph 17 within such 90-day period, all rights and obligations hereunder of both the Bakery and the Consignee's estate shall terminate at the expiration of such period except (a) the right to receive any favorable balances and the obligation to pay any adverse balances and (b) the right of the Consignee's estate to receive and the obligation of the Bakery to pay to his estate the entire proceeds subject,

however, to the Bakery's lien per Paragraph 16) of any sale of this franchise (in whole or in part) made or contracted to be made by the Bakery within the next 90 days; provided, however, that, if the Bakery shall have provided distribution services within all or any portion of the territory during all or any portion of the period from any excess of its expense over income in providing such services. If the Bakery provides emergency distribution services under Paragraph 6 during all or any portion of th first 90-day period, any excess of its income over expense in providing such service shall be paid to the Consignee's estate (subject to any right of set-off that may exist), but his estate shall not be liable to the Bakery for any excess of its expense over income in providing such services, although any such excess of expense may be deducted from the proceeds of sale.

22. NOTICES. All notices which are required to or which may be given under the terms hereof shall be in writing and shall be deemed given when deposited in the United States mail, postage prepaid, and addressed to the other party at the address designated for such party on the cover page hereof. Either party may change such address by giving notice of a new address.

23. DURATION OF CONSIGNMENT AGREEMENT. This agreement shall continue in effect until terminated in the manner provided in Paragraph 18, 19, 20 or 21.

24. GENERAL. The terms of this agreement shall be construed so as to carry into effect its true intent and meaning, and any ambiguities shall be contrued and any inconsistencies shall be reconciled accordingly. Any consent, permission, authorization or waiver given hereunder with respect to any continuing act or condition may be subsequently revoked in the same manner as given.

25 ENTIRETY OF CONSIGNMENT AGREEMENT. This agreement represents the entire agreement between the Bakery and the Consignee and supersedes any and all prior franchises, agreements or understandings between the Bakery and the Consignee, whether written or oral, regarding distribution of Consigned Products. This agreement may not be amended orally or by custom or conduct but only by a writing signed by both the Bakery and the Consignee.

An additional provision of this franchise is written on the back.

Dated at Norwalk, Connecticut, April 25, 1970.

April 25, 1970

This consignment agreement is accepted upon the term stated above.

By /s/

Consignee

Eli Albert Mesirow

April 25, 1970

PEPPERIDGE FARM, INCORPORATED

By /s/

Its Vice-President - Marketing

(Title)

SCHEDULE A

DESCRIPTION OF TERRITORY

In the State of California, in the Counties of San Joaquin, Alameda, Contra Costa and Solano, all that territory described as follows:

North - From a point directly north of Main Street in Port Chicago and the Solano County-Contra Costa County line; west on the Solano-Contra Costa County line to Highway 21 (Alternate 680); northwest on Highway 21 (Alternate 68) to the junction of State Highway 21 and Interstate 80; northeast on State Highway 21 to U.S. 80; southwest on U.S. 80 to the Napa-Solano County line to San Pablo Bay and Sonoma Creek.

South - From a point at the San Francisco Bay and High Street in the City of Oakland; northeast on High Street (not including) to Interstate 580; southeast on

Interstate 580 to State Highway 13; north on State Highway 13 (including) to Redwood Road; southeast on Redwood Road (including) to the Alameda-Contra Costa County line; east-southeast on the Alameda-Contra Costa County line to Interstate 680; south on Interstate 680 to U.S. 50; east on U.S. 50 (not including) to County Road J4.

East - North on County Road J4 (from Route 50) to State Route 4; northwest on State Route 4 to State Route 160 at Antioch; north on State Route 160 to the Solano-Contra Costa County line; west on the Contra Costa-Solano County line to a point directly north of Main Street in Port Chicago.

West - From a point of the San Pablo Bay and Sonoma Creek; south on the eastern shores of San Pablo Bay to the point of San Pablo Canal; then a straight line east to MacDonald Avenue and Garrard Road; east

on MacDonald Avenue (not including) to Interstate 80; north on Interstate 80 to San Pablo Avenue; northwest on San Pablo Avenue (including) to San Pablo Dam Road; east on San Pablo Dam Road (including) to Valley View Road; continue along San Pablo Dam Road (including) to Camino Pablo; south on Camino Pablo to State Highway 24; west on State Highway 24 through Caldecott Tunnel to Warren Freeway (Highway 13); south on Warren Freeway (Highway 13) to Moraga Avenue; west on Moraga Avenue (including) to Grand Avewnue; continue west on Grand Avenue (including) to the San Francisco Bay; along the shoreline of San Francisco Bay to High Street in the City of Oakland.

______________________________, 19___
APPROVED:

/s/
Consignee
Eli Albert Mesirow

______________________________, 19___
APPROVED:
PEPPERIDGE FARM, INCORPORATED

By /s/

Its Vice-President - Marketing
(Title)

Pepperidge Farm, Inc.
Downers Grove, IL 60515
(312) 968-4000

April 25, 1970

Mr. Eli Albert Mesirow
809 Seminole Drive
Livermore, CA

Dear Mr. Mesirow,

Products which you sell to your customers may not be returned to us for credit by reason of damage or by reason of over-code (over-age) nor will you receive credit for any complimentary products you may distribute. We may make exceptions of course, by giving you written notice in particular cases.

You agree to continue maintaining an adequate and fresh supply of franchise products in all stores and to continue removing promptly all damaged and over-code products from the stores. Over-code products may be sold to stores dealing exclusively in stale products, but you agree not to sell such products to any other purchaser.

Please acknowledge receipt of this letter by signing and returning to us the attached copy of this letter.

ACCEPTED:

April 25, 1970

/s/

Eli Albert Mesirow

PEPPERIDGE FARM, INCORPORATED

By /s/

Its Vice President - Marketing

Date: April 25, 1970

PEPPERIDGE FARM

CONSIGNMENT AGREEMENT

* * *

Pepperidge Farm, Incorporated
of Norwalk, Connecticut

HEREBY GRANTS

AN

EXCLUSIVE FRANCHISE

TO

Name: ELI ALBERT MESIROW

Address: 809 Seminole Drive,
Livermore, California

AS A

CONSIGNEE

within the territory and upon the
terms stated in the following pages.

DEFINITIONS

(a) BAKERY - refers to PEPPERIDGE FARM, INCORPORATED, the grantor of this franchise, a Connecticut corporation having its principal office in Norwalk, Connecticut.

(b) CONSIGNEE - refers to the grantee of this francise.

(c) TERRITORY - refers to the territory described in Schedule A hereto.

(d) CONSIGNED PRODUCTS - refers to those products listed in Schedule B hereto (subject to modification per Paragraph 10) but only when packaged or wrapped under the brand name "Pepperidge Farm" and sold or intended to be sold to retail stores as fresh (i.e. not preserved or stale), first quality (i.e. not seconds) merchandise and does not include (a) any of such products sold, or intended to be sold, to retail stores frozen, canned, or otherwise preserved, (b) stale products, (c) seconds, or (d) merchandise of others

containing Consigned Products as components.

(e) STALE PRODUCTS - refers to Consigned Products whose shelf life has expired, as determined by the Bakery's stale policy existing from time to time.

(f) SECONDS - refers to Consigned Products which do not meet the high standards required by the Bakery for distribution in the ordinary manner and thus are deemed by the Bakery, in its sole discretion, to be unsuitable for that purpose.

(g) DISTRIBUTION OR DISTRIBUTE - refers to the sale and delivery of Consigned Products to retail stores within the teritory and to such hotels, restaurants, etc, as may be authorized by the Bakery per Paragraph 9.

(h) BULLETIN PRICES - refers to the prices for Consigned Products charged by the Bakery and published from time to time.

(i) CHAIN - refers to any person, firm, corporation or other legal entity that owns or operates three or more retail stores.

TERMS

1. EXCLUSIVENESS OF FRANCHISE. The Consignee will have the exclusive right to distribute Consigned Products to retail stores within the territory, and the Bakery will not sell or deliver or authorize any others to sell or deliver the same products to retail stores within the territory except in connection with temporary sales programs; provided, however, that the Bakery will have the exclusive right to distribute Consigned Products to retail facilities woned or operated by the Bakery or by any corporation controlled by the Bakery. The terms of this paragraph are subject, however, to the terms of Paragraphs 6, 7 and 9.

2. QUANTITIES CONSIGNED. Bakery will consign and deliver to Consignee and

consignee will accept sufficient quantities of Consigned Products to maintain at all times an adequate and fresh supply thereof in all retail stores in the territory which request such products and whose accounts are not demonstrably unprofitable; provided, however, that Bakery reserves the right to allocate its products as nearly proportionately as practicable if the overall demand for its products exceeds its production. Consignee shall hold and care for all Consigned Products as the sole and exclusive property of Bakery. Title to all Consigned Products shall be vested in, subject to, and under the control of Bakery until sold by Consignee.

3. PROCEEDS AND RECORDS OF SALES.

(a) Except as provided in subparagraph (b), Consigned Products shall be sold and delivered on consignment to Consignee at Bulletin Prices, less the percentage specified in Schedule B, for

resale and delivery to retail stores at such prices as Consignee may determine.

(b) The Bakery will bill directly all chains and military commissaries that have requested such direct billing or that request it in the future. Such stores in the territory will be direct customers of Bakery, and the Consignee will solicit sales from them and receive product for delivery to them on the Bakery's behalf at Bulletin Prices. Consignee shall have the exclusive right to perform the service of delivery of Consigned Products to such direct customers of Bakery and Bakery shall not effect such delivery except through Consignee, subject to the provisions of Paragraph 6, 7 and 9. For the performance of his service of solicitation and delivery under this subparagraph (b), Consignee shall be paid a percentage of net proceeds paid to Bakery by the direct billing customers, such percentage to be calculated at the rate specified in Schedule (B).

(c) Bakery will from time to time extend credit to Consignee for Consigned Products to be resold to retail stores on credit extended by Consignee; provided Bakery has approved in advance the stores to receive such credit and the amount and terms thereof. Notwithstanding the foregoing, any credit extended by Consignee shall be at consignee's risk.

(d) (1) Consignee shall pay promptly each week on the day specified by Bakery for all Consigned Products sold and delivered by Consignee during the preceding week, less any amounts which would be otherwise due on such sales as to which Bakery shall have extended credit to Consignee under (c) above, plus any amounts becoming due during such week under the terms of credit extended during any previous week.

(2) The Consignee shall promptly deliver to Bakery each week on the day specified by Bakery all charge tickets for all deliveries of Consigned Products to

direct customers of Bakery for direct billing by Bakery.

(e) Consignee will keep such records of Consigned Products received and sales and deliveries made as Bakery may from time to time request; Bakery may inspect such records and Consigned Products at such times as Bakery may select. Without limiting the generality of the foregoing, Consignee agrees that Bakery may take physical inventory of Consigned Products in Consignee's possession whenever and as often as Bakery deems advisable and that Consignee will keep such records of his operation and will furnish Bakery such copies thereof as Bakery may reasonably require.

4. DISTRIBUTION EFFORTS. The Consignee will use his best efforts to realize the full sales potential of the territory for Consigned Products. To this end, he will (a) actively solicit all retail stores whose accounts can be profitably handled, (b) use his best

efforts to maintain at all times an adequate and fresh supply of consigned Products in all such stores, (c) co-operate with the Bakery in the effective utilization of the Bakery's advertising and sales-promotion programs and (d) keep fully informed of the Bakery's recommendations of policies and methods for increasing sales and improving distribution service.

5. DISTRIBUTION SERVICE AND FACILITIES. The Consignee will maintain efficient distribution service throughout the territory in keeping with the established reputation of the Bakery and the high quality of its products. To this end, he will (a) provide adequate facilities and equipment for the receipt, handling and delivery of Consigned Products, (b) comply with all applicable health and sanitary laws and regulations and (c) maintain such route books and other records as are required by Bakery from time to time.

6. EMERGENCY SERVICE. If, by reason of illness or vacation or any other cause, the Consignee shall be unable at any time to maintain the efficient distribution service contemplated by this agreement, he will make other suitable arrangements at his own expense for the maintenance of such service; but, if he is unable or fails to do so, the Bakery is authorized in its discretion to provide such service as his agent and at his expense and risk. Upon the request of the Consignee, the Bakery will endeavor in any emergency to provide such service as his agent and at his expense and risk.

7. FAILURE TO SERVE PARTICULAR STORES. If the Consignee fails for any reason to maintain satisfactory distribution service to any retail store within the territory and such failure is not remedied within five days after written notice therof from the Bakery, the Bakery may make other arrangements, on either a permanent or temporary basis in

the discretion of the Bakery, for the service of such store.

8. CHAIN STORE ACCOUNTS. If any chain store orgainzation requires that authorization for the distribution of Consigned Products to the chain's retail stores in the territory shall be obtained through a central or district office located outside of the territory, or only in conjunction with the distribution of Consigned Products to its retail stores in other territories, the Bakery will co-operate with the Consignee in procuring such authorization. If any chain store organization refuses to pay or to permit its store managers to pay any Consignee directly for Consigned Products and, instead, requires the submission of a consolidated bill to central or district office of the chain, the Bakery will handle the billing and the collections for all such products, subject to the terms of Paragraph 3.

9. PROHIBITED SALES AND DELIVERIES. The Consignee will not sell or deliver any Consigned Products directly to consumers or to any other purchasers except retail stores withing the territory and such hotels, restaurants, clubs and similar organizations within the territory as the Bakery may authorize in writing. Also, the Consignee will not, without like authorization, make deliveries of Consigned Products to any chain store organization via a central or district warehouse or in any manner other than directly to its retail stores. If, despite the best efforts of the Consignee and the Bakery to obtain permission from any chain to make deliveries directly to its retail stores, such chain refuses to handle Consigned Products except via warehouse deliveries, the Bakery shall have the right in its discretion to sell and deliver its products directly to such chain for its own account via warehouse

deliveries as long as such refusals remains in effect.

10. MODIFICATION OF LIST OF PRODUCTS. The list of Consigned Products set forth in Schedule B hereto may be modified or changed by the Bakery from time to time by (a) adding such other products as it may deem advisable among those which it now or hereafter produces, (b) withdrawing any products (whether originally listed or subsequently added) which it discontinues producing or selling or (c) adding or withdrawing at any time with or without notice and for any reason any product designated as "test product," "for market test" or the like. In addition, the Bakery shall have the right from time to time to change the ingredients, the method of production or the labelling or packaging of any Consigned Products.

11. SALES DATA. The Consignee will furnish to the Bakery such sales data as it may reasonably require for the planning

of its production schedules, the expansion of its operations and the planning and conduct of sales promotion programs.

12. TRADE NAME, ETC. The Consignee may use the Bakery's trade name, trademark and distinguishing colors on his trucks and other equipment and supplies; provided, however, that (a) the Bakery's trade name may not be used as a part of any business name or trade name of the Consignee without the written consent of the Bakery or in any other way which will tend to confuse the separate identities of the Bakery and the Consignee, and (b) the Bakery shall have the right at any time to revoke the permission granted in this paragraph if, in its opinion, the general appearance of the Consignee's trucks or other equipment or his own general appearance or deportment or that of his helper or helpers, if any, shall fall below standards in keeping with the established reputation of the Bakery and the high quality of its products.

13. NON-PERFORMANCE FOR REASONS BEYOND CONTROL. Neither the Bakery nor the Consignee shall be liable for any failure to comply with the terms of this agreement if such failure shall have been caused primarily by fire, labor dispute, strike, war, insurrection, governmental restriction or any other cause beyond the control of the party so failing.

14. INDEPENDENT BUSINESSMAN. The Consignee is a self-employed independent businessman, not an agent or employee of the Bakery, and has no authority other than to sell products consigned to him hereunder, express or implied, to do or perform any act or thing or to make any warranty or representation or promise or commitment of any character which will be binding upon the Bakery or for which it will be responsible, and he will refrain from any conduct inconsistent with the terms of this paragraph.

15. LIEN OF BAKERY ON FRANCHISE. The Bakery shall have a first lien on this

franchise as security for all indebtedness of the Consignee to the Bakery at any time outstanding. Any sale, transfer or assignment of this franchise (invalid per Paragrah 17 without the written approval of the Bakery) shall be subject to such lien unless such lien shall be expressly released by the Bakery in writing.

16. SALE OF FRANCHISE. Subject to the terms of Paragraph 15, this franchise may be sold by the Consignee as a whole at any time with the written approval of the Bakery, and the Bakery will grant such approval with respect to a proposed sale if the purchaser meets the requirements of the Bakery as to character, ability, financial responsibility and adequate facilities. In addition, this franchise may be sold in part on similar terms and conditions if the Bakery also gives its written approval to the division of territory sought to be effected thereby. The Bakery will notify the Consignee with reasonable promptness of its approval or

disapproval of any proposed purchaser and, if applicable, of any proposed division of the territory. Any transaction or instrument which purports purchaser and, if applicable, of any proposed division of the territory. Any transaction or instrument which purports to constitute a sale, transfer or assignment of this franchise as a whole or in part without such written approval shall be void. Any valid sale of this franchise as a whole shall operate to release the Consignee from all obligations to the Bakery hereunder except the obligation to pay in full any adverse balance in his account with the Bakery, and the Bakery shall have the right in its discretion to require the purchaser to accept a new consignment agreement in substantially the same form, except for a description of the territory in the case of a sale of a part of the franchise, in lieu of continuing this agreement in effect in whole or in part on an assigned basis.

17. TERMINATION OF CONSIGNMENT AGREEMENT FOR CAUSE. The Bakery shall have the right in its diecretion to terminate this agreement at any time, upon written notice to the Consignee, for any of the following causes:

(a) failure of the Consignee adequately to realize the sales potential of the territory and his failure to make satisfactory improvement within thirty days after notice of inadequacy from the Bakery.

(b) failure of the Consignee to perform or comply with any other material term of this agreement and the continuance of such failure for seven days after written notice thereof from the Bakery,

(c) failure of the Consignee to maintain the general appearance and condition of his trucks or other equipment or his own general appearance or deportment or that of his helper or helpers, if any, in accordance with standards in keeping with the established

reputation of the Bakery and the high quality of its products and the continuance of such failure for more than five days after written notice thereof from the Bakery, or repeated failures of such character even though a previous failure or failures have been temporarily corrected after notice,

(d) any dishonesty of the Consignee in his dealings with the Bakery or with others in connection with his distribution services under this agreement,

(e) the Consignee's insolvency or admission in writing of his inability to pay his debts as they mature,

(f) the filing of a voluntary bankruptcy petition by the Consignee or his failure to vacate an involuntary bankruptcy petition within sixty days after date of filing,

(g) failure of the Consignee to vacate the appointment of a receiver or trustee of his business or assets within

sixty days after the date of appointment, or

(h) a general assignment by the Consignee for the benefit of his creditors.

Termination pursuant to this paragraph shall operate to release all rights and obligations hereunder of both the Bakery and the Consignee except the right to receive any favorable balances and the obligation to pay any adverse balances.

18. TERMINATION OF CONSIGNMENT AGREEMENT WITHOUT CAUSE. The Bakery shall have the right in its discretion to terminate this agreement at any time without cause upon written notice to the Consignee. Upon termination pursuant to this paragraph the Bakery will pay to the Consignee a sum equal to the fair market value of this franchise on the termination date plus 25% of such value, such value to be determined either by agreement between the Bakery and the Consignee or, if they shall be unable to agree, by three

arbitrators, one of whom shall be chosen by the Bakery and one by the Consignee and the third by the two first chosen. The determination of fair market value by a majority of the three arbitrators shall be final and binding upon both the Bakery and the rights and obligations hereunder of both the Bakery and the Consignee except (a) the right to receive any favorable balances and the obligation to pay any adverse balances and (b) the rights and obligations with respect to payment and arbitration stated in this paragraph.

19. TERMINATION OF CONSIGNMENT AGREEMENT BY CONSIGNEE. The Consignee shall have the right in his discretion to terminate this agreement at any time upon thirty days' written notice to the Bakery. Termination pursuant to this paragraph shall operate to release all rights and obligations hereunder of both the Bakery and the Consignee except the right to receive any favorable balances

and the obligation to pay any adverse balances.

20. DEATH OF CONSIGNEE. In case of the Consignee's death, all the terms of this agreement (see particularly Paragraph 6) shall continue in effect during the next 90 days, and shall inure to the benefit of and be binding upon the legal representatives of his estate during such period. If the legal representatives of the Consignee's estate shall not have sold this franchise pursuant to Paragraph 17 within such 90-day period, all rights and obligations hereunder of both the Bakery and the Consignee's estate shall terminate at the expiration of such period except (a) the right to receive any favorable balances and the obligation to pay any adverse balances and (b) the right of the Consignee's estate to receive and the obligation of the Bakery to pay to his estate the entire proceeds subject, however, to the Bakery's lien per Paragraph 16) of any sale of this

franchise (in whole or in part) made or contracted to be made by the Bakery within the next 90 days; provided, however, that, if the Bakery shall have provided distribution services within all or any portion of the territory during all or any portion of the period from any excess of its expense over income in providing such services. If the Bakery provides emergency distribution services under Paragraph 6 during all or any portion of the first 90-day period, any excess of its income over expense in providing such service shall be paid to the Consignee's estate (subject to any right of set-off that may exist), but his estate shall not be liable to the Bakery for any excess of its expense over income in providing such services, although any such excess of expense may be deducted from the proceeds of sale.

21. NOTICES. All notices which are required to or which may be given under the terms hereof shall be in writing and

shall be deemed given when deposited in the United States mails, postage prepaid, and addressed to the other party at the address designated for such party on the cover page hereof. Either party may change such address by giving notice of a new address.

22. DURATION OF CONSIGNMENT AGREEMENT. This agreement shall continue in effect until terminated in the manner provided in Paragraph 17, 18, 19 or 20.

23. GENERAL. The terms of this agreement shall be construed so as to carry into effect its true intent and meaning, and any ambiguities shall be construed and any inconsistencies shall be reconciled accordingly. Any consent, permission, authorization or waiver given hereunder with respect to any continuing act or condition may be subsequently revoked in the same manner as given.

24. ENTIRETY OF CONSIGNMENT AGREEMENT. This agreement represents the entire agreement between the Bakery and

the Consignee and supersedes any and all prior franchises, agreements or understandings between the Bakery and the Consignee, whether written or oral, regarding distribution of Consigned Products. This agreement may not be amended orally or by custom or conduct but only by a writing signed by both the Bakery and the Consignee.

Dated at Norwalk, Connecticut, May 2, 1977.

May 2, 1977

This consignment agreement is accepted upon the term stated above.

/s/
Consignee
Eli Albert Mesirow

May 2, 1977

PEPPERIDGE FARM, INCORPORATED

By /s/
John E. Tierney

Its Director-Sales
(Title)

SCHEDULE A

DESCRIPTION OF TERRITORY

In the State of California, in the Counties of Alameda, Contra Costa and Solano all that territory described as follows:

NORTH - From a point at the Solano-Contra Costa County line and Interstate 680; thence northwest on Interstate 680 (excluding the town of Benicia) to Interstate 80; thence southwest on Interstate 80 to the Napa-Solano County line to San Pablo Bay and Sonoma Creek.

SOUTH - From a point at San Francisco Bay and High Street in the City of Oakland; thence northeast on High Street, not including to Interstate 580; thence southeast on Interstate 580 to State Highway 13; thence north on State Highway 13 (including) to Redwood Road; southeast on Redwood Road (including) to the Alameda-Contra Costa County line; thence east-southeast on the Alameda-Contra Costa County line to Interstate 680; thence south on Interstate 680 to U.S. 50; thence east on U.S. 50 (not including) to County Road J-4.

EAST - North on County Road J-4 to Marsh Creek Road; thence northwest on Marsh Creek Road not including the town of Clayton to the Concord Town line; thence west on the Concord Town line to Ygnacio Valley Road; thence west on Walnut Creek-Concord Town line to Pleasant Hill-Walnut Creek Town line; thence west on Walnut Creek Pleasant Hill Town line becoming only the Pleasant Hill town line; thence north on the westerly side of Pleasant Hill Town line to Martinez-Pleasant Hill Town line; thence north on the westerly side of Martinez Town line to the Solano-

Contra Costa County line; thence east to Interstate 680.

WEST - From a point of the San Pablo Bay and Sonoma Creek; thence south on the eastern shores of San Pablo Bay to the point of San Pablo Canal; thence a straight line east to MacDonald Avenue and Garrard Road; thence east on MacDonald Avenue (not including) to Interstate 80; thence north on Interstate 80 to San Pablo Avenue; thence northwest on San Pablo Avenue (including) to San Pablo Dam Road; thence east on San Pablo Dam Road (including) to Valley View Road; continue along San Pablo Dam Road (including) to Camino Pablo; thence south on Camino Pablo to State Highway 24; thence west on State Highway 24 through Caldecott Tunnel to Warren Freeway (Highway 13); thence south on Warren Freeway (Highway 13) to Moraga Avenue; thence west on Moraga Avenue (including) to Grand Avenue; continue west on Grand Avenue (including) to West Grand Avenue; thence continue northwest on West Grand Avenue (including) to the San Francisco Bay; thence along the shoreline of San Francisco Bay to High Street in the City of Oakland.

APPROVED: May 2, 1977

/s/

Consignee
Eli Albert Mesirow

APPROVED: May 2, 1977
PEPPERIDGE FARM, INCORPORATED

By /s/
John E. Tierney

Its Director - Sales
(Title)

Pepperidge Farm, Incorporated
Norwalk, Connecticut

Gentlemen:

I would like to distribute under my Consignment Agreement the following additional products on a temporary and non-exclusive basis:

Herb Stuffing	8 oz - 24/pak
Corn Stuffing	8 oz - 24/pak
Herb Stuffing	1 lb - 12/pak
Cube Stuffing	7 oz - 24 pak
Cube Stuffing	14 oz - 12/pak

with the understanding that I will not acquire any rights with respect to these additional products. I agree, if you so request at any time with or without cause, to discontinue distributing these additional products, but I request 30 days notice before discontinuance.

I agree that commissions on Bakery sales of such additional products solicited by me shall be paid to me at the rate of 25% which may be amended by Bakery from time to time.

/s/
Eli Albert Mesirow May 2, 1977

APPROVED: PEPPERIDGE FARM, INCORPORATED

By: /s/
John E. Tierney
Director - Sales

Gentlemen:

I would like to distribute under my Consignment Agreement, but on a temporary, non-exclusive basis only, the following additional products:

6-1/2 oz - 20/pak #7248
Cheddar Cheese Croutons

6-1/2 oz - 20/pak #7249
Onion-Garlic Croutons

6-1/2 oz - 20/pak #7250 Plain Croutons

6 oz - 20/pak #7251 Seasoned Croutons

6 oz - 20/pak #7252 Cheese-Garlic Croutons

with the understanding that I will not acquire any rights with respect to these additional products or their distribution. I agree, if you so request at any time with or without cause, to discontinue distributing these additional products, but I request 30 days' notice before discontinuance.

I agree that commissions on Bakery sales of such additional products solicited by me shall be paid to me at the rate of 25% which may be amended by Bakery from time to time.

/s/
Eli Albert Mesirow May 2, 1977

APPROVED: PEPPERIDGE FARM, INCORPORATED

By: /s/
John E. Tierney
Director - Sales

SCHEDULE B

LIST OF CONSIGNED PRODUCTS
(SUBJECT TO MODIFICATION
PER PARAGRAPH 10)

Southport
Monte Carlo
Seville
Champagne
Pirouettes
Pirouettes--Choc. Laced
Butter Cookies
Orleans
Lido
Milano
Tahiti
Nassau
Butter Chessman-
Bordeaux
Capri
Lisbon
Chocolate Chip
Chocolate Brownie Nut
Fudge Chip
Cinnamon Sugar
Oatmeal Raisin
Lemon Nut Crunch
sugar
Gingerman
Molasses Crisp
Peanut
Brown Sugar
Irish Oatmeal
Shortbread
Date-Nut Granola
Raisin Bran
Oatmeal Almond
Sunflower Raisin
Oatmeal Marmalade
Adelaide

Goldfish Snack
Crackers - Bag

Cheddar Chese
Parmesan Cheese
Salted
Pizza
Sesame Garlic
Pretzel

Mixed Suits
Snack Crackers
Bag

Pretzel Cheese
Green Onion
Sesame Cheese

For distribution of the foregoing products to direct billing customers of Bakery under Paragraph 3(b) of this agreement,

(Consignee will be paid a percentage of the net proceeds of such sales paid to Bakery) calculated at the rate of 20% of the published prices in effect from time to time for Consigned products.

May 2, 1977

APPROVED:

/s/
____
Consignee
Eli Albert Mesirow

May 2, 1977

APPROVED:
PEPPERIDGE FARM, INCORPORATED

By ______________________________
John E. Tierney

Its Director - Sales
(Title)

DECLARATION OF SERVICE

BY MAIL

I am a citizen of the United Sttes and a resident of the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within above-entitled action. My business address is 1390 Market Street, Suite 908, San Francisco, California. On this day I served the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing 3 true copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail Box at San Francisco, California, addressed to said court and to counsel for respondent addressed as follows:

Forrest A. Hainline, III
Cooper, Kirkham, Hainline & McKinney
300 Montgomery Street, Suite 600
San Francisco, CA 94104

Dated May 27, 1983 at San Francisco, California.

Maxwell Keith

No. 82-1931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELI MESIROW AND THOMAS MORRIS,
Petitioners,

VS.

PEPPERIDGE FARM, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FORREST A. HAINLINE III
Counsel of Record
PIERSON, BALL & DOWD
1200 18th St., N.W.
Washington, D.C. 20036
(202) 331-8566

On Behalf of Respondent

QUESTIONS PRESENTED

1. In determining whether there were material facts genuinely in dispute on a motion for summary judgment, did the courts below properly disregard sham issues?

2. Under the Sherman Act, did Pepperidge Farm lawfully set the wholesale price of its biscuit products:

(a) during Fair Trade, when Pepperidge Farm sold to retailers only through distributors;

(b) after Fair Trade, when

(1) Pepperidge Farm set its wholesale price only to its direct billed customers, *i.e.*, chain stores which requested central billing by Pepperidge Farm and which distributors were free to solicit to become distributor customers, billed by the distributor at his or her prices; and

(2) Pepperidge Farm products were sold through distributors on a true consignment, with Pepperidge Farm bearing all significant risks of loss?

3. Did Pepperidge Farm violate the Sherman Act by marking its biscuit products with a suggested retail price, which retailers were free to and did change at will?

4. Under the Sherman Act, did Pepperidge Farm lawfully permit its distributors to sell portions of their exclusive territories to others?

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No. 82-1931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELI MESIROW AND THOMAS MORRIS,
Petitioners,

VS.

PEPPERIDGE FARM, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Pepperidge Farm[1] opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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[1] Petitioners are Eli Mesirow ("Mesirow") and his half-brother, Thomas Morris ("Morris"), former distributors of certain biscuit products of Respondent Pepperidge Farm, Incorporated ("Pepperidge Farm"). Mesirow and Morris will at times be referred to as "Mesirow/Morris."

"Pet." refers to the Petition for a Writ of Certiorari.

"ER" is the Excerpt of the Record filed by petitioners in the Ninth Circuit, cited to the page number as stamped on Appellants' Excerpt of Record and the line numbers where appropriate. Page numbers beginning with ("S") are in a Supplemental Excerpt filed in the Ninth Circuit. The Clerk's Record on Appeal is designated "CR," followed by the number indexed on the Clerk's docket sheet and page numbers in the document as filed in the district court. Within such descriptions, depositions will be abbreviated "dep.", declaration "decl." and affidavit "aff."

Appendix is abbreviated "App."

All emphasis in quotations has been added.

OPINIONS BELOW

The district court's opinion is published at 1981-2 CCH Trade Cases ¶ 64.292 and printed at App. B; the Ninth Circuit opinion is published at 703 F.2d 339 and printed at App. C and D.

STATUTES INVOLVED

In addition to the statutes listed in the Petition, the case also involves California's Fair Trade Law, codified in California Business & Professions Code, §16902, printed at App. A.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is, as in both courts below, a jumble of "unsupported assertions, improper attempts to alter or ignore sworn deposition testimony, or factual distinctions without substantive impact" (App. B-11). The Petition ignores and directly contradicts petitioners' sworn cross examined testimony in order to "raise sham issues" (App. C-9); it also "distorts and exaggerates" the extensive evidentiary record in order to create the illusion of reviewable issues (*See* App. B-14).

Each of the following facts was plainly established by the record and is not fairly in dispute, having been proven either by (a) Mesirow's or Morris's admissions, or (b) by other competent evidence uncontradicted by competent admissible evidence.

1. The Parties.

Respondent Pepperidge Farm is a Connecticut corporation engaged in the business, among others, of baking biscuit products and selling them on consignment through distributors (ER 1048:29-32).

Petitioner Mesirow was a distributor of Pepperidge Farm biscuit products from January, 1970 until May 13, 1978, when he was terminated for cause as a result of his failure to pay his bills (Mesirow dep., ER 631:27-632:23, 758:9-16, 758:28-759:21, 764:26-765:12, 777-789, 870, 871).

Petitioner Morris was a distributor of Pepperidge Farm biscuit products from April 25, 1970 until August, 1978, when Morris sold the remainder of his franchise to another (ER 001:27-32; Morris dep., ER 933:14-17, 959-968). Mesirow and Morris considered themselves to be partners and operated their distributorships jointly (Mesirow dep., ER 675:28-677:1; Morris dep., ER 915:17-917:11).

2. Definitions.

Biscuit products are cookies and crackers (ER 1049: 1-4).

Dry products are stuffing and croutons (ER 1049:1-4. Mesirow dep., ER 751:15-16). Dry products, as well as biscuits, were "consigned products" under the terms of Mesirow's and Morris's Consignment Agreements with Pepperidge Farm (*e.g.*, Mesirow decl., ER 088, 089, 091.) Their suggestion to the contrary (Pet. 5) has no support in the record.

Fresh coded shelf life is the time during which Pepperidge Farm biscuit products, which are baked without preservatives, can be considered "fresh" on retail shelves. The fresh coded shelf life from date of delivery to the distributor is 12 weeks for biscuit products, 20-25 weeks for croutons and 52 weeks for stuffing. (ER 1049:5-13; Mesirow dep., ER 647:10-27; Morris dep., ER 948:15-16)

Overcode or "stale" items are biscuit and dry products whose fresh coded shelf life has expired (ER 1049:11-13. Mesirow dep., ER 647:25-27).

Chain account is any person, firm, corporation or other legal entity that owns or operates three or more retail stores under a single trade name (ER 1051:14-24; Mesirow dep., ER 636:22-27; 723:10-15; 724:2-14; Morris dep., ER 933:2-934:25, 961, 971).

Direct billing accounts are those chain accounts which have requested direct billing by Pepperidge Farm at the chain's regional or headquarters level, at a price applicable to product delivered to all stores in an area. Direct billing accounts are billed by and pay Pepperidge Farm directly for product delivered to their stores, and the Pepperidge Farm distributor is paid a commission on the sale calculated as a percentage of the wholesale price. Direct billing accounts are customers of Pepperidge Farm. (Mesirow dep., ER 636:28-637:3; Morris dep., ER 933:3-934:5, 960 ¶3, 961 ¶8; ER 554:3-19; 999-1001. Mesirow decl., ER 1058:18-25; 1051:14-1052:32)

Distributor account is a store billed by a distributor at the distributor's price. It can be a chain account, such as Longs, or an individual store. (Mesirow dep., ER 638:14-19, 724:2-14, 725:25-726:2, CR 219, 410:27-411:18; Morris dep., ER 916:25-27, 920:10-24. ER 561-562; 571:16-22. ER 1053:25-1054:18)

Chain accounts were either direct billing accounts or distributor accounts. There is no competent evidence of a "*hybrid chain account*" (Pet. 13). *See* App. C-8, C-9.

3. Pepperidge Farm's Small Share of the Biscuit and Dry Products Market.

In 1975, Pepperidge Farm's national share of cookies and crackers was somewhat less than 3%; its 1975 share of the San Francisco cookies and crackers market was somewhat less than 2.5% (ER 1050:11-20). Pepperidge Farm's share of the United States market for cookies and crackers by 1980 was only 3.64%; its 1980 share of the San Francisco market was 3.2%. Mesirow/Morris's claim that Pepperidge Farm "is a dominant company in the premium cookie business" (Pet. 6) is totally unsupported by the unauthenticated figures which petitioners cite.[2]

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[2] Mesirow/Morris's claim that Pepperidge Farm products are "prominently displayed" (Pet. 6) is both irrelevant and unsupported. No evidence compares Pepperidge Farm displays with those of other manufacturers.

4. Pepperidge Farm Charges Its Wholesale Price Only to Its Customers, i.e., Those Chains Which Have Requested a Direct Seller-Purchaser Relationship With Pepperidge Farm.

Certain chains request and others require direct billing at a single price for deliveries of product to the chain's stores, regardless of which distributor might make the delivery or which store receives it. Since the repeal of Fair Trade, Pepperidge Farm has established direct seller-purchaser relationships only with such chains. Sales calls are made on these accounts by Pepperidge Farm employees, who also survey and monitor the stores to assure proper service and attempt to obtain greater product authorization, shelf space and promotions. Pepperidge Farm trains its distributors and their employees/delivery persons to properly service Pepperidge Farm's direct customers, and Pepperidge Farm employees are always available to take over a distributor's route, temporarily as needed because of sickness or other absence, in order to assure that service to its customers is maintained. (ER 1051:9-32, Mesirow dep., ER 633:7-14, 640:5-641:22, 645:27-646:2, 663:1-664:25, 692:1-27, 776:5-13; Montreal dep., ER 884:14-16, 885:14-20, 886:2-12, 887:8-11, 888:10-27. ER 1001) Petitioners' statement to the contrary (Pet. 35) is unsupported.

Mesirow/Morris's experience after they ceased to be Pepperidge Farm distributors confirms that certain chains require central billing at one price as a condition of doing business, as Richard Montreal, who obtained authorizations for their non-Pepperidge Farm products, testified (ER 883:14-20, 886:2-12). Mesirow/Morris distributed Sunshine, Little Dutch Boy, Neldam and several other cookies (Mesirow dep., ER 641:4-22; Morris dep., ER 905:8-12). In order to accomodate the demands of Safeway and other chains that one presentation only of a product be made and at one price, Mesirow and Morris would meet with other sellers of these products and horizontally agree upon a single price to be presented to a chain. One distributor would then make the sales call on behalf of all. (Morris dep., ER 909:14-911:9, 912:8-11; Mesirow dep.,

ER 634:19-26, 635:7-11, 642:27-643:4; Montreal dep., ER 886:2-19)[3]

Pepperidge Farm pays for all promotional advertising on its biscuit and dry products sold at its direct chain customers' stores. Promotional product is sold to direct customers at a discount from the stated wholesale price with the distributor receiving his or her commission as a percentage of the non-discounted wholesale price (ER 1052:9-32). Mesirow and Morris never paid for a promotion on Pepperidge Farm product delivered to a Pepperidge Farm direct customer (Mesirow dep., ER 665:5-8; S004:6-8).

After the repeal of Fair Trade, Pepperidge Farm informed its distributors that it would no longer attempt to control in any way the wholesale prices charged by distributors to accounts which the distributors billed. For Pepperidge Farm's direct billing accounts, distributors, including Mesirow/Morris, would be paid a commission based on deliveries to such stores in their territories, and a new consignment agreement was structured accordingly (ER 1051:5-13). For sales made to Pepperidge Farm's direct customers, the distributor acts as a commissioned deliveryman (ER 1051:25-1052:8. Mesirow dep., ER 693:17-694:28, 695:16-696:5, 696:27-697:6). Some distributors, including Mesirow/Morris, in turn hire their own commissioned deliverymen to deliver product to Pepperidge Farm's and the distributor's accounts (Mesirow dep., ER 680:15-22, 748:15-22).

Only those chain stores which request direct billing by Pepperidge Farm are billed and priced by Pepperidge Farm. Many chain stores do not make such a request; these are billed and priced by Pepperidge Farm's distributors and are the distributor's customers. The choice is the chain's. For example, in the San Francisco area, Longs Drugs, Pay Less Drugs and Seven/Eleven have been distributor customers, not Pepperidge

[3] In the district court, Pepperidge Farm argued that Mesirow/Morris had suffered no antitrust injury under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) and *Kestenbaum* v. *Falstaff Brewing Corp.*, 575 F.2d 564 (5 Cir. 1978), *cert. denied*, 440 U.S. 909 (1969). Mesirow and Morris would have been able to receive a higher price from chains requesting direct billing only as result of a horizontal price fixing agreement among distributors. The district court did not reach the issue (B-17).

Farm customers. In Sacramento, Davis, Modesto and Fresno, Safeway and Albertson's are distributor customers. (ER 1051:25-1053:24; 1314:6-24; 1320:6-25; 1326:6-24; 1333:1-25; 1340:6-24; 1346:1-20; 1352:6-23; 1359:6-24; 1365:6-24; 1371:1-19; 1377:6-24; S014:6-24; 1019-1023; 561-562; 571:16-22; 592:12-18, 539:1-24)

Petitioners falsify the record at Pet. 47-48 where they list ten Bay Area distributors as not directly billing chain accounts in their territories. Each of these Pepperidge Farm distributors swore that there were chain stores in his territory which are his customers and are charged whatever wholesale price he chose to charge that the store would accept. Amadon: Longs, Deluxe Foods (ER 1314); Cox: Longs, Payless, United Markets, A & B Markets, Roger Wilco Markets, Seven/Eleven (ER 1320); Ennor: Payless, Longs (ER 1326); Garcia: Longs, Payless, Big T, Lairds, Walgreens (ER 1333); Gee: Manor Markets, Longs, Payless, Key Markets (ER 1340); Hermann: Longs, Albertsons, Safeway, Cala Foods, Q.F.I. Markets, Walgreens, Co-Op (ER 1346); Karsh: Payless (ER 1352); Leavitt: Longs, Payless, Bill's, Walgreens (ER 1359); Lloyd: Longs, Walgreens (ER 1365); Nicholson: Payless, Longs, Bill's, Food Fair, Walgreens, Food Villa (ER 1371); Pierce: Shop 'n' Save, Farmers Market, Longs (ER 1377).

Contrary to petitioners' claims (Pet. 12-13; 15) there is no evidence that Pepperidge Farm selects or "reserves" some chains to be direct billing customers. After Fair Trade, any distributor was free to solicit any chain to become the distributor's own customer at the distributor's own price. Mesirow/Morris's largest account, Longs, was a chain which was their customer, billed by them at a price which they chose. (Mesirow dep., ER 638:14-19, 724:2-14, 725:25-726:2, 729:21-24. ER 561-562; 574:20-576:20. ER 1051:25-1054:18; 1314:6-24; 1320:6-25; 1326:6-24; 1333:1-25; 1340:6-24; 1346:1-20; 1352:6-23; 1359:6-24; 1365:6-24; 1371:1-19; 1377:6-24; S014:6-24. CR 345, 1019-1023; 561-562; 571:16-22; 592:12-18, 593:1-24)

5. Mesirow and Morris Billed All Their Accounts —Chain and Independent—At Mesirow/Morris's Wholesale Prices.

Pepperidge Farm has no interest or involvement in the wholesale pricing of any biscuit product delivered to distributor customers (ER 1002, 1051:5-13, 1053:25-1054:30). After Fair Trade, Mesirow/Morris had the option to, and did bill their direct customers at wholesale prices different from those charged by Pepperidge Farm (Mesirow dep., ER 638:14-19, 639:9-21, 729:16-24). After the repeal of Fair Trade, Pepperidge Farm never told Mesirow/Morris what wholesale price to charge Longs, their largest chain distributor account, or any other of their distributor accounts (Mesirow dep., ER 730:19-731:6. ER 574:20-576:20. ER 1051:5-13). After the repeal of the Fair Trade, Pepperidge Farm did not communicate its wholesale prices to Longs or any other retailer not its direct customer (ER 577:8-15; Mesirow dep., ER 731:23-28. ER 1053:25-1054:18).[4]

Mesirow testified at deposition about pricing to stores which he billed such as Longs:

Q. When you sold product to stores that you billed, did you ever charge them a price different than that on some list given you by Pepperidge Farm?

A. Always.

Q. You did?

A. Yes.

---

[4] Mesirow/Morris assert that Pepperidge Farm sent its price list to their chain customer Longs. The only "evidence" on the point relates to times before 1976, during Fair Trade. Mesirow/Morris testified at deposition that their price to Longs was chosen by them and different from the Pepperidge Farm price. Mesirow also testified that he never attempted to charge Longs a price different from that charged by Pepperidge Farm to its direct accounts (*See*, App. B-12). The only genuine dispute below was as to when Mesirow chose to testify truthfully under oath. In any event, "[T]he dissemination of price information is not itself a *per se* violation of the Sherman Act." *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86, 113 (1975); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9 Cir. 1982).

(Mesirow dep. CR 216, 62:14-19)

Mesirow was asked specifically about his pricing to Longs:

> Q. Did you ever charge the accounts that you billed a charge different than the wholesale price that Pepperidge Farm was charging to its accounts?
>
> A. Yes.
>
> Q. And did you ever charge Longs a different price?
>
> A. Yes.

(Mesirow dep. CR 219, 418:25-419:2; 419:12-15)

Mesirow's "always" charged "stores that [he] billed a price different than that on some list given [him] by Pepperidge Farm" (Mesirow dep., CR 216, 62:14-19).

6. Pepperidge Farm Biscuit and Dry Products are Delivered to Distributors on Consignment, with Pepperidge Farm Bearing All Risks of Loss.

Pepperidge Farm consigns its biscuit products to its distributors, bearing all risks incident to ownership until the time the product is delivered to a retail store (ER 1054:19-30. ER 989-990):

a. It pays any and all applicable inventory and property taxes (ER 1054:19-30; Mesirow dep., ER 658:1-659:10; 698:28-699:2).

b. It carries all insurance against theft, loss or damage while its product is in the possession of its distributors (ER 1054:19-30; 1081:18-1082:1).

c. It bears all risk of theft, loss or damage. For example, if product is stolen from a distributor, Pepperidge Farm will bear the entire loss. In April, 1975, virtually all Pepperidge Farm product in the Mesirow/Morris warehouse was "stolen."[5] Pepperidge Farm bore that entire loss, in the amount of \$21,386.88, of which insurance covered only \$11,386.88. (ER 1081:18-1082:1. ER 989; Mesirow dep., ER 685:28-686:2;

---

[5] "Stolen" placed in quotation marks because Mesirow/Morris's brother, Reny Morris, testified that the "theft" was set up by Mesirow as a way to defraud Pepperidge Farm (R. Morris dep., ER 891:12-14; 896:27-897:28).

687:18-24; 688:1-17; 689:7-11; 690:7-28; 707:13-27; 828; Morris dep., ER 944:6-10; 945:13-15; Reny Morris dep., ER 891:12-14; 896:27-897:28) Neither Mesirow nor Morris bothered to estimate the amount of product that had been "stolen" from their warehouse because "it was [Pepperidge Farm's] product." Nor did they declare the loss on their income tax returns. (Mesirow dep., ER 685:28-686:2, 687:18-24, 688:1-17, 689:7-11, 690:7-28, 698:4-9, 698:25-699:12, 705: 22-707:27; Morris dep., ER 944:6-10, 945:13-15; 989; Reny Morris dep., ER 891:12-14, 896:27-897:24, ER 989). Indeed, Mesirow/ Morris never paid attention to the amount of product in their warehouse because "it was [Pepperidge Farm's] product" (Mesirow dep., ER 705:22-706:28, 707:13-27, 708:24-28, 709:20).

d. Pepperidge Farm worked with and trained Mesirow/Morris's "independent contractors" who were delivering Pepperidge Farm product (Mesirow dep., ER 663:8-664:25).

e. Pepperidge Farm surveyed Mesirow/Morris's territories to determine the number of stores into which Pepperidge Farm product could be sold; Mesirow/Morris themselves made no such surveys (Mesirow dep., ER 669:27-671:21. ER 1052:9-32). Indeed, Mesirow/Morris relied completely upon Pepperidge Farm for information on "what was going on" in the stores of Pepperidge Farm's direct customers in their territories (Mesirow dep., ER 736:23-737:25, 738:5-739:1).

f. Pepperidge Farm paid for all promotions for sale of its biscuit products in those stores billed by Pepperidge Farm as its direct customers (Mesirow dep., ER S004:6-8, S005:19-26, 672:1-28, S006:1-9, S007:15-20. ER 1052:9-32).

g. Pepperidge Farm bears all risk and the considerable expense of billing its direct customers and of carrying their accounts receivable (ER 1053:1-24; 1080:30-1081:17).

7. The So-Called "Risk of Stales" Is Illusory. Overcode Returns Are Non-Existent with the Exercise of Ordinary Prudence.

Pepperidge Farm biscuit and dry products are baked without preservatives and will not remain fresh indefinitely (see p. 3, above). Under his or her Consignment Agreement with Pepperidge Farm, a distributor agrees to supply stores with fresh product and remove from shelves product on which the fresh code has expired (*e.g.*, Mesirow decl., ER 068). Such removal insures that customers purchasing Pepperidge Farm product find it to be fresh, thereby preserving Pepperidge Farm's reputation, to the benefit of both Pepperidge Farm and its distributors. (ER 594:6-20; 1310:1-10; 1316-1-10; 1322:1-10; 1329:1-10; 1336:1-10; 1342:1-10; 1348:1-10; 1355:1-10; 1361:1-10; 1367:1-10; 1373:1-10; S010:1-10; 1049:14-29)

The 12, 20 and 52 week fresh coded periods provide a distributor with ample time to insure retail sale of Pepperidge Farm biscuit and dry product. Proper business management and care for the product entirely eliminates overcode returns. Most Pepperidge Farm distributors have little or no return of overcoded items, with West Coast distributors removing less than 1% of Pepperidge Farm biscuit and dry product from retail shelves for being out of code. (ER 562:566; 595:1-598:12, 599:4-12, 600:17-601:15, 602:2-7, 603:1-23; 643-644, 620-621; 877:22-28, 878:10-28, 879:8-21; 1003-1010, 1016-1017; 1035), 1310:11-1313:16; 1316:11-1319:16; 1322:11-1325:16; 1329:11-1332:16; 1336:11-1339:16; 1342:11-1345:16; 1348:11-1351:16; 1355:11-1358:16; 1361:11-1364:16; 1367:11-1370:16; 1373:11-1376:16; S010:11-S013:16) Morris admitted, "A wise businessman can eliminate stales off the shelf" (Morris dep., ER 941:14-18).

The minimal amounts of overcoded Pepperidge Farm product that is removed from shelves can be and is sold by distributors to "thrift stores"—stores specializing in the sale of out-of-code products. Pepperidge Farm has continuously operated "thrift stores" in Southern California and throughout the

United States which accept overcode product from distributors, who are then given full credit for their cost of the product. (ER 1030-1033, 1035-1045; 559-560; 987, 989-990, 1016-1017)

Mesirow/Morris sent overcoded product to Pepperidge Farm thrift stores until 1976, when they opened their own thrift store, selling overcode biscuit product at a profit (Mesirow decl., ER 1060:29-32, CR 345, Mesirow dep., ER 716:17-19, 741:14-24, 767:9-17, 768:18-769:5, 769:17-23, 772:18-28, 773:21-25; Morris dep., ER 942:13-20). After closing their thrift store, Mesirow/Morris again shipped overcode product to Pepperidge Farm thrift stores (Mesirow dep., ER 742:8-12, 846).

Pepperidge Farm will take back any product delivered to distributors in a damaged or "short coded" condition, *i.e.*, with less than a full fresh shelf life. It will also take back product delivered to a distributor in error. On occasion, Pepperidge Farm has introduced a new product which has not sold well. It has customarily accepted returns of this product even though it may have been out-of-code. (Mesirow dep., ER 701:28-702:9, 703:4-7, 703:23-26, 743:18-21, 763:18-28, 872. ER 996-998, 1007; 599:13-600:2. ER 1313:17-31; 1319:17-31; 1325:17-30; 1332:14-27; 1339:18-31; 1345:14-27; 1351:14-27; 1358:17-31; 1364:17-30; 1370:14-27; 1376:17-30; S013:17-30)

Pepperidge Farm has instructed its distributors, including Mesirow/Morris, to refuse to accept short coded product and to return it for credit. Mesirow/Morris ignored these instructions. (Mesirow dep. ER 770:12-24, 872. ER 563)

8. Mesirow's and Morris's Overcoded Product Returns Resulted Solely from Their Shoddy Business Practices and Sales to Their Direct Customers.

The bulk of Mesirow/Morris's deliveries were to Longs stores on promotional "ads" and "tabs" (Morris dep., ER 923:27-925:6). Mesirow and Morris used their own discretion

in determining how much product they would deliver to Longs (Morris dep., ER 920:10-21, 921:8-922:24, 925:3-20, 929:10-13). Mesirow/Morris could have guided Longs in its purchases so that large amounts of product would not remain unsold (Morris dep., ER 925:28-926:6, 927:9-18, 928:8-12, 941:14-18). They simply failed to do so (Mesirow dep., ER 745:3-8, 745:28-746:11; Morris dep., ER 925:3-20).

Product which Mesirow and Morris picked up from Longs as unsold was often still within the fresh coded period, though with a shorter time remaining. Mesirow and Morris redistributed this product to other stores and with proper management, it could have been sold before the expiration of the fresh coded period (Morris dep., ER 925:12-24, 939:7-24, 940:8-14; ER 948:15-26).

Much of Mesirow/Morris's overcoded product went out of code in their warehouse, sitting there for from 4 months to a year without even being put on the market (Mesirow decl., ER 1059:31-1060:2, Morris dep., ER 936:28-937:12; Mesirow dep., ER 733:23-734:1). Mesirow/Morris attribute their overcode product to Pepperidge Farm ordering "quotas" during promotions (Pet. 49). The claim is belied by petitioners' own deposition testimony and the declarations they filed on summary judgment. Pepperidge Farm *never* forced Mesirow/Morris to over-order on promotions; they over-ordered because it made them feel like "the big guy" (Morris dep., ER 949:2-950:8; Morris dep., ER 950:18-21). Mesirow/Morris were at all times free to order whatever quantities they chose (Mesirow dep., ER 717:11-23, 718:7-9, 718:22-719:2, 719:14-720:6, 733:23-734:1, 735:21-736:7, 760:2-761:5, 761:23-762:5; Morris dep., ER 931:17-932:17, 936:28-937:10, 951:16-952:12, ER 562-564; 595:1-27). Mesirow/Morris simply neglected to change their standard order after selling portions of their franchises (Morris dep., ER 930:21-28, 931:17-932:24, 936:28-937:12, 951:16-952:11; Mesirow dep., ER 717:7-23, 718:7-9, 718:22-719:2, 719:14-720:6, 735:21-736:7, 760:2-761:5, 761:23-26, 762:1-5).

Mesirow/Morris's poor business practices caused whatever overcode problems they may have had:

a. They never knew how much product they had in their warehouse (Mesirow dep., ER 708:24-28, 709:20).

b. They never kept records of how much product was received from Pepperidge Farm at their warehouse (Mesirow dep., ER S008:12-15).

c. They never kept any records of which products were and were not "moving" in stores they serviced (Mesirow dep., ER 700:7-28, 710:20-711:15; Morris dep., ER 947:10-16).

d. Mesirow, who did the ordering for himself and Morris (Morris dep., ER 930:16-20), never reviewed credit slips to see what products were being returned as out of code (Mesirow dep., ER 744:7-19).

e. Such a review would not have been helpful in any event because credit slips they prepared for out of code items did not reflect the actual products for which Mesirow/Morris issued credits (Mesirow dep., ER 747:10-22).

f. Mesirow, when ordering, often "did not have time" to look at his weekly inventory reports so that he would know what products ne already had in stock (Mesirow dep., ER 721:17-21, 722:8-23).

g. When Mesirow filled out his consigned inventory reports for himself and Morris and sent them to Pepperidge Farm, these reports never accurately reflected actual product in their inventory (Mesirow dep., ER 750:14-25, 752:18-20, 753:4-754:16).

9. Sales During Fair Trade.

While Fair Trade laws were in effect, Pepperidge Farm entered into Fair Trade Agreements with Mesirow and Morris under which each agreed that Pepperidge Farm had the right to determine the wholesale price of Pepperidge Farm product delivered by him, so long as the law permitted (Mesirow dep., ER 632:4-23, 644:8-18, 659:24-28, S003:1-9, 777, 790, 804, 816; Morris dep., ER 933:2-934:17, 961, 972. ER 1051:1-4).

Pepperidge Farm does no mail order business. A separate company, Pepperidge Farm Mail Order Company, Inc. ("Mail Order"), a wholly owned subsidiary of the Campbell Soup Co., was incorporated in 1974. Mail Order has its own officers, offices and financial records separate and distinct from those of Pepperidge Farm. (ER 1055:1-18)

Mail Order has sold only products which are called "specialty items." Its product line primarily consists of chocolate candies, nuts, soap, soups, cheese, syrups and jellies. Mail Order does sell some cookies, but these are packaged specially for Mail Order in distinctive gift packs: tins, jars, baskets and backpacks. Cookies packaged in Mail Order's distinctive packs are sold by mail directly to the public and are not sold to wholesalers or retail stores in direct competition with the distributors. (ER 1055:1-18)

10. Retail Stores Have Discretion to and Do Change Pepperidge Farm's Suggested Retail Price.

Pepperidge Farm biscuit products come with a preprinted retail price. This is a suggested retail price only which retail stores are and have been free to change if they choose; stores customarily do change this suggested retail price. (ER 1314:1-5; 1320:1-5; 1326:1-5; 1332:28-32; 1335:1-5; 1345:28-32; 1352:1-5; 1359:1-5; 1365:1-5; 1370:28-32; 1377:1-5; S014:1-5, Mesirow dep., ER 650:9-12, 651:6-18, 652:14-15, 654:24-655:2, 683:22-684:3; Morris dep., ER 946:1-12. CR 345, 1002-1003) Pepperidge Farm instructed distributors to carry the necessary equipment to effect any price change a retail store requested (Mesirow dep., ER 653:19-654:1; Morris dep., ER 946:1-12). Both courts below correctly disregarded Mesirow/Morris's unsupported assertions to the contrary, as at Pet. 10 (App. B-12; App. C-9).

11. Pepperidge Farm Does Not Force Its Distributors to "Split" or Sell-Off Portions of Their Territories.

Pepperidge Farm distributors have exclusive franchise territories. They have an exclusive right to solicit and sell to

distributor accounts within these territories and an exclusive right to deliver upon commission to stores of Pepperidge Farm customers within these territories (CR 345, Mesirow dep., 627:27-628:7. CR 345, 551:24-26, 552:15-23). Pepperidge Farm believes that by granting exclusive territories it ensures that its product will be aggressively marketed against products of other manufacturers (CR 346, 1050:21-32).

Pepperidge Farm's interest is to have profitable distributors and to increase and maximize sales in every distributor's territory (ER 993-995, 1011-1013; 556:24-26; 578:4-14, 579:24-26, 581:14-27). In no event does Pepperidge Farm require a distributor to sell or "split" any part of his or her territory (ER 584:14-19, 585:19-586:16; 993-995, 1012-1015). Where splits occur, Pepperidge Farm expects and has experienced that not only will a distributor realize a capital gain on the sale, but he or she will also realize greater profits from the remaining, better serviced, territory (ER 555:17-19; 578:6-13, 582:17-24; 1012-1015).

No evidence supports petitioners' claim that Pepperidge Farm sales managers "were ordered . . . to obtain route splits" (Pet. 18). The evidence showed only that sales managers set their own objectives and were praised if their goals were attained (Montreal dep., ER 1440:15-28. ER 993, 1013) and that distributors themselves thought splits would be advantageous (ER 1012). A split was always within a distributor's "own judgment and discretion" (Montreal dep., ER 1442:11-14. ER 555:17-19; 992, 1012, 1016). At most, Pepperidge Farm sometimes suggested that distributors sell portions of their territories for the purpose of improving service (ER 1631:19-1632-27).

Petitioners do not claim that any of *their own* route splits was coerced, nor can they. Montreal disclaims personal knowledge of why Mesirow and Morris split their routes (ER 1441:1-14). The uncontradicted evidence is that Pepperidge Farm never demanded any Mesirow/Morris route split (ER 583:18-584:19, 585:19-586:16). Mesirow declared that he viewed his Pepperidge Farm franchise as a "honey pot" and that the reason he sold portions of his territory from time to

time was to "finance our extravagant way of living" (Mesirow decl., ER 1068:26-31).

Mesirow paid $10,000 to his predecessor for his Pepperidge Farm franchise, $5,000 of which Pepperidge Farm loaned to him. Morris paid $3,500 for his franchise territory (Mesirow dep., ER 627:24-628:7, 629:14-16; Morris dep., ER 913:21-914:3). In 1973, 10-15% of the original combined territory was sold for $14,000. In 1976, 5-10% of the original territory was sold for $16,500. In 1977, 5-10% of the original territory was sold for $33,000. In 1978, 10-12% of the original territory was sold for $33,000. In 1978, 10-12% of the original franchise territory was sold for $22,000 (ER 1394:22-1395:28; 1397:30-1398:24). Simple arithmetic calculation shows that petitioners realized extraordinary capital gains on each sale:

	Proportional Cost	Gain Realized	Percentage Realized
Sale #1-15%	$2,025	$ 11,975	591%
Sale #2-10%	$1,350	$ 15,150	1122%
Sale #3-10%	$1,350	$ 31,650	2344%
Sale #4-12%	$1,620	$ 30,380	1875%
Sale #5-12%	$1,620	$ 20,380	1258%
TOTALS	$7,965	$109,535	1375%

None of the capital gain was reported in Mesirow's or Morris's tax returns (Mesirow's dep., ER 661:23-24, 662:6-17, 668:17-26, 675:23-677:1, 678:26-679:23, 681:25-682:15, 713:11-714:10, 755:10-756:13, 757:3-28, 817-827, 829-869).

REASONS FOR DENYING THE WRIT

I.

THE PETITION IS BUT ANOTHER ATTEMPT BY MESIROW/MORRIS TO DISTORT AND FALSIFY THE DISCOVERY RECORD.

As a supposed reason for granting the writ, petitioners "urge that there are material issues with respect to the facts found by the appellate court" (Pet. 49). The questions framed by the Petition assume and are based upon asserted facts which both courts below found did not exist on the extensive discovery record.

Generally, "A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker* v. *Schofield*, 243 U.S. 114, 118 (1917). Additionally, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

These principles require a denial of the petition, especially because here, as in both courts below, petitioners distort and falsify the extensive discovery record. Such distortions cannot defeat a motion for summary judgment or require review by this Court.

1. Petitioners deliberately falsify portions of the discovery record to which they cite, as at Pet. 47-48 (discussed above at p. 7), violating the duty to in good faith accurately state or summarize pertinent facts. Stern & Gressman, *Supreme Court Practice* (5th ed. 1978), p. 465.

2. "Facts" asserted in the petition repeatedly directly conflict with Mesirow's and Morris's sworn deposition testimony under cross-examination, "the best method yet devised for testing trustworthiness of testimony." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944). Both courts below properly disregarded petitioners' attempts to "raise sham issues" (App. B-11, B-12; App. C-8, C-9). As the Ninth Circuit had earlier held in *Radobenko* v. *Automated Equipment Corp.*, 520 F.2d 540, 543-4 (9 Cir. 1975), adopting the rule in the Second Circuit:

> "When confronted with the question of whether a party should be allowed to create his own issue of fact by an affidavit contradicting his prior deposition testimony, the Court of Appeals for the Second Circuit held that no *genuine* issue of fact was raised. *Perma Research & Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). Therein the Court noted:

> '[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.' 410 F.2d at 578." (Emphasis in original.)

Accord: *Lopez* v. *General Motors Corp.*, 697 F.2d 1328, 1333 (9 Cir. 1983); *Schwimmer* v. *Sony Corp. of America*, 637 F.2d 41, 45 (2 Cir. 1980); *Holifield* v. *Cities Service Tanker Corp.*, 421 F.Supp. 131, 136 (E.D.La. 1976), *aff'd without op.*, 552 F.2d 367 (5 Cir. 1977); *Bryant* v. *Western Elec. Co.*, 572 F.2d 1087 (5 Cir. 1978). *Radobenko* is consistent with a court's inherent power to protect the integrity of the judicial process. See, *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980).

3. Documentary evidence offered in opposition to a motion for summary judgment must be ignored if not properly authenticated. *Hamilton* v. *Keystone Tankship Corp.*, 539 F.2d 684, 686 (9 Cir. 1976). Mesirow/Morris's attorney attempted to authenticate documents as "from the files of Pepperidge Farm" or "given to me by counsel for Pepperidge Farm" (*e.g.* ER 051:29-31, Keith decl., ER 165:20-166:28, Keith decl., ER 451:21-452:23, Keith decl. ER 1419:26-1420:14). This is not adequate. *United States* v. *Dibble*, 429 F.2d 598, 602 (9 Cir. 1970); N.D. Cal. Rule 220-7.

4. Affidavits and declarations in opposition to a motion for summary judgment must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), F.R.Civ.P. Hearsay, speculation and other incompetent evidence may not be considered. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 859 (9 Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 905-906 (9 Cir. 1968); *Schwimmer* v. *Sony Corp. of America, supra*, 637 F.2d at 45, n.8; *Kern* v. *Tri-State Insurance Co.*, 386 F.2d 754, 756 (8 Cir. 1967).

5. Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question. *Comfort Trane Air Conditioning* v. *Trane Co.*, 592 F.2d 1373, 1383 (5 Cir. 1979); *Scott Medical Supply Co.* v. *Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 937 (5 Cir. 1974).

The Mesirow declarations (ER 059-065; 437-43; 1479-1484) were for the most part hearsay, self-serving conjecture and unsupported opinion. The declaration of Richard B. Montreal (ER 444-450) on its face was a combination of opinion and speculation; its misleading assertions were not made "on personal knowledge," because Montreal severed his connection with Pepperidge Farm in 1971 and does not even purport to have personal knowledge of its practices within the 1974-78 time frame relevant to this lawsuit (Montreal decl. ER 444:25-32). His declaration had no evidentiary value and was properly disregarded. F.R.Civ.P., Rule 56(e); N.D. Cal. Rule 220-7; *MAPCO, Inc.* v. *Carter*, 573 F.2d 1268, 1282 (TECA 1978), *cert. denied*, 437 U.S. 904 (1978); *United States* v. *Dibble supra*, 429 F.2d at 601-602.

If this Court were to undertake a "more-than-diligent search" of the record as the district court did (B-12), it too would find that Mesirow/Morris's "facts" are no more than restated allegations, thoroughly contradicted by Mesirow's and Morris's own sworn testimony or dependent upon bizarre distortions of testimony and unsupported by any competent evidence.

II.

THE NINTH CIRCUIT OPINION WAS CORRECT AND IN CONFLICT WITH NEITHER *SIMPSON* NOR THE FIFTH CIRCUIT

The Ninth Circuit was correct in finding lawful under the Sherman Act Pepperidge Farm's wholesale and retail pricing practices and the manner in which it permitted distributors to divide and sell portions of their exclusive territories.

A. Pepperidge Farm's Wholesale Pricing Practices Were Lawful.

Mesirow/Morris argue that Pepperidge Farm's wholesale pricing practices violated the Sherman Act both during and after Fair Trade. Both courts below properly found no violation on the extensive evidentiary record.

1. During Fair Trade.

Contrary to petitioners' assertion (Pet. 26, 30), *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) did not decide what effect the Fair Trade Laws would have on Union's pricing systems. *See*, 377 U.S. at 24.

Prior to January 1, 1976, the laws of the United States and the State of California permitted a manufacturer to set the wholesale and retail prices of its trademarked products sold by others. 15 U.S.C. § 1 (relevant part repealed by Pub. L. 94-145, 89 Stat. 801 (1975)); 15 U.S.C. § 45(a)(2)-(5) (repealed by Pub. L. 94-145, 89 Stat. 801 (1975)); *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21 (9 Cir.), *cert. denied*, 403 U.S. (1971). Accordingly, Pepperidge Farm entered into Fair Trade Agreements with Mesirow and with Morris under which Pepperidge Farm dictated the wholesale price of its trademarked products in so far as the Fair Trade laws permitted (See pp. 14-15, above).

In the district court, Mesirow/Morris argued that Pepperidge Farm had forfeited the protection of the Fair Trade laws by limiting its control to wholesale prices. The district court properly rejected this argument under *General Electric Co. v. Federal Employees' Distributing Co.*, 45 Cal.2d 891, 291 P.2d 942 (1955) (App. B-7, B-8). Mesirow/Morris abandoned the argument in the Court of Appeals and argued there that Pepperidge Farm competed horizontally with its distributors, thereby losing Fair Trade protection under *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), which the Petition does not mention.

McKesson & Robbins did not involve a manufacturer selling product only through distributors, as Pepperidge Farm does and did. McKesson sold to wholesalers for resale, but it

also sold to retailers *through its own employees.* For every sale made by a McKesson employee, a McKesson wholesaler was deprived of its participation in the profit from that sale. Pepperidge Farm sells, and during Fair Trade sold, to retailers only through distributors.

Unlike *McKesson & Robbins,* Mesirow/Morris participated in and realized profit from every sale of Pepperidge Farm product in their territories. There was no competition with Pepperidge Farm of the kind which was found to deprive McKesson of rights under Fair Trade, as The Ninth Circuit correctly held. (App. C-7, C-8)

2. After Fair Trade.

Both courts below found that, since the repeal of Fair Trade, Pepperidge Farm has not violated the Sherman Act by setting the wholesale price of its biscuit products only to those chain stores which request direct billing at a single wholesale price for all deliveries of product to their stores, regardless of which distributor makes the delivery or which store receives it. Petitioners challenge the decisions below as being in conflict with *Simpson* v. *Union Oil Co., supra,* and the Fifth Circuit's *Greene* v. *General Foods Corp.,* 517 F.2d 635 (5 Cir. 1975), *cert. denied,* 424 U.S. 942 (1976).

Simpson holds that where a dealer or distributor bears all the risks of loss on a product, losses against which the dealer must insure, 377 U.S. at 15, the manufacturer may not coercively set the retail price of that product. *Greene* condemned dictation of prices to a purchaser of product who bore the entire risk of the product's loss. In *Simpson* and *Greene,* the dealer was unable to offer the purchaser the option of buying from the dealer at dealer prices.

The decisions below were entirely in harmony with both *Simpson* and *Greene.* The asserted conflict in the decisions arises solely "from differences in states of fact, and not in the application of a principle of law." The petition for a writ of certiorari should consequently be denied. *Wisconsin Electric Co.* v. *Dumore Co.,* 282 U.S. 813 (1930); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 392-3 (1923);

Keller v. *Adams-Campbell Co.*, 264 U.S. 314, 319-20 (1924). Among the significant factual differences between Pepperidge Farm's marketing practices and those which *Simpson* and *Greene* condemned are:

a. ***Risk of Loss***

The gasoline retailer in *Simpson* bore all risk of loss, except for "specified acts of God," 377 U.S. at 15. In *Greene*, "General Foods [made] no pretense to ownership of the goods that are ultimately sold to the [multiple food service accounts]; it concede[d] that title to these rest[ed] in the independent distributor." 517 F.2d at 657. The distributor bore the entire risk of loss. 517 F.2d at 641.

Unlike the situation in *Simpson* and *Greene*, Pepperidge Farm bore all risk of loss on product consigned to its distributors. It paid all inventory and property taxes; it carried insurance against theft and damage (See pp. 9-11, above). Most significantly, when Mesirow/Morris's warehouse was suddenly and mysteriously emptied by a "theft" in 1975, Pepperidge Farm stood for the entire loss of over $21,000, although insurance reimbursed it for only one-half that amount (See pp. 9-10, above). Pepperidge Farm also shouldered the expense of billing and the risk of non-collection from its direct accounts (See p. 10, above).

Where a manufacturer continues to bear the risk of loss for goods sold on consignment, that manufacturer has the right to specify the price at which its goods can be sold. *Hardin* v. *Houston Chronicle Pub. Co.*, 434 F.Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5 Cir. 1978), decided by the Fifth Circuit after *Greene* (upholding consignment sales of newspapers at the publisher's prices where the paper bore the risk of loss):

> "Plaintiffs assert that the new system is an improper consignment system in violation of *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). However . . . [*t*]*he consignment system in Simpson was invalidated because the economic risk remained with the distributor. Here the economic risk is borne by the Chronicle.*" 434 F.Supp. at 56.

Accord, Loom Crafters, Inc. v. *New Central Jute Mills Co.*, 1971 Trade Cas.¶73,734 at 91,073 (S.D.N.Y. 1971); *Action Towing & Rental* v. *U-Haul Intern.*, 507 F.Supp. 987 (E.D. La. 1981); *Lawrence J. Gordon, Inc.* v. *Brandt, Inc.* 554 F.Supp. 1144, 1150 (W.D. Wash. 1983).

Mesirow/Morris claim only one "risk of loss" in connection with Pepperidge Farm's products, (CR 346, Mesirow decl., 1060:15-18; MM.Br., 25), the "risk of stales," that the product will go out of code (Pet. 49). That is not a risk of loss at all. A consignee has a duty to treat consigned property with ordinary care. *Baugh* v. *Rogers*, 24 Cal.2d 200, 215; 148 P.2d 633, 641 (1944); *Windeler* v. *Scheers Jewelers*, 8 Cal.App.3d 844, 850; 88 Cal.Rptr. 39, 43 (1970). By deliberately over-ordering product known to have limited shelf life and allowing product to remain in their warehouse for over four months without attempting to deliver it to retailers, Mesirow/Morris breached their obligations as consignees (See pp. 12-14, above). Mesirow/Morris have admitted that they could have eliminated their overcode problem through proper ordering and that their overcode returns resulted from incorrect and improper orders they sent to Pepperidge Farm (See pp. 11, 13, above). Other Pepperidge Farm distributors in the San Francisco Bay Area have no overcode returns to speak of and product which does go out of code can be shipped to Pepperidge Farm thrift stores for full credit or sold on the thrift market for a profit, as Mesirow and Morris claim to have done (See p. 11, above).

Moreover, the so-called "risk of stales" has nothing to do with the practice petitioners claim to be unlawful. Mesirow/Morris's overcode product can be traced to sales to Longs, their direct customer, and to product sitting in their warehouse for four months without delivery to any retailer (See pp. 12-14, above). Mesirow/Morris's overcoded product had nothing to do with deliveries to accounts billed by Pepperidge Farm, and cannot be a basis for their claim. *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 499-500 (9 Cir. 1977).

b. *Absence of Coercion*

In *Simpson*, the retailer was coerced by Union Oil to charge nothing but Union Oil prices. In *Greene*, General Foods

sold its products to distributors, which in turn re-sold the product to multiple food service accounts ("MFSA's") and the distributors' own down-the-street accounts. The distributor billed both types of accounts, and had no option but to bill the MFSA's at prices dictated by General Foods. 517 F.2d at 640. The distributors were unable to solicit any MFSA to become their own customer. 517 F.2d at 656, and General Foods re-designated Greene's customers as MFSA's. 517 F.2d at 640.

Pepperidge Farm distributors were free to solicit any account, however large, to be a distributor customer, billed by the distributor at his or her prices (See pp. 5-7 above). Mesirow/Morris's largest customer, the Longs chain, was their own account (See pp. 7-9, above). Pepperidge Farm billed direct at its prices only those chains requesting such a relationship (See p. 5, above). The nature of the relationship was not coerced by Pepperidge Farm; it was chosen by the chain as a condition of doing business (See pp. 5-7, above).

c. ***Promotional and Selling Services***

In *Simpson*, promotional and selling services depended entirely upon the initiative and enterprise of the dealers.

"Greene performed promotional and selling services to MFSA's in his territory." 517 F.2d at 645. "Greene's sales efforts directed toward MFSA's were no different from those directed toward" his own accounts. 517 F.2d at 656. The distributor obtained authorization for sales to MFSA's and bore the day-to-day task of creating and maintaining customer satisfaction with these MFSA's. General Foods' staff was not involved. 517 F.2d at 657-658.

Pepperidge Farm paid for all promotions of its product at its direct billed customers. Mesirow/Morris never paid for a promotion on Pepperidge Farm product delivered to a Pepperidge Farm direct customer (See pp. 6, 10, above).

Sales calls on Pepperidge Farm's direct customers were made by Pepperidge Farm employees, who also surveyed and monitored the customers' stores to assure proper service.

Pepperidge Farm employees attempted to obtain greater product authorization, shelf space and promotions in its direct customer stores. Pepperidge Farm employees trained distributors and distributors' employees to properly service Pepperidge Farm's direct customer stores. Pepperidge Farm employees were available to take over distributors' routes, temporarily as needed, to assure that proper service to Pepperidge Farm direct customer stores was maintained (See pp. 5, 10, above). Mesirow/Morris relied completely upon Pepperidge Farm for information about sales to Pepperidge Farm customer stores in their territory (See p. 10, above). Mesirow testified about these stores:

"Q. Without having visited the stores yourself, do you have any idea whether the shelves in those stores were full of Pepperidge Farm product or not?

"A. Pepperidge Farm visited them quite often.

"Q. Do you have any idea?

"A. No." (CR 345, Mesirow dep., 737:2-7).

d. *Direct Sales*

Simpson was not concerned with customers who choose to be billed and priced by a manufacturer. In *Greene*, product was sold to the distributors, who resold that product to MFSA's 517 F.2d at 641. The distributor billed both MFSA's and "down-the-street" accounts. 517 F.2d at 640.

Pepperidge Farm sold product directly to its customers, billing them itself and assuming all risk of collection (See p. 10, above).

The Fifth Circuit, which decided *Greene*, finds nothing unlawful in a system under which a manufacturer sells directly to its customers at its price and delivers product through distributors paid on commission. In *Hardin* v. *Houston Chronicle Pub. Co., supra, all* customers became direct customers of the Houston Chronicle. Because the paper did the solicitation, billing and collection, these were its customers, receiving product through commissioned deliverymen, lawfully billed at the Chronicle's prices:

"Plaintiffs claim that the effect of the new distribution system is to allow the Chronicle to continue to fix the resale price of the newspapers. There is no question that the

Chronicle under the new system will control the price of the newspapers to the consumer, *but that control is the result of the Chronicle's direct sales. This is not an unlawful restraint on prices.* It is permissible for a publisher, like other manufacturers, to set its prices to those who buy directly from the publisher." 434 F.Supp. at 57.

Other courts agree. *Overhead Door v. Nordpal Corp.*, 1979 Trade Cases ¶62,595 (D. Minn. 1978), at 77,431, distinguishing *Greene*, held that where a manufacturer promotes sales, solicits customers and finalizes terms of sales agreements, the manufacturer can lawfully set the selling price of products delivered to those customers by distributors. There is no *resale* price fixing because there is but a single sale. *See* App. B-6; *Action Towing & Rental v. U-Haul International, supra*, 507 F.Supp. 987.

Similarly, in *Blatt v. Lorenz-Schneider Co., Inc.*, 1980-81 Trade Cas. ¶63,670 (S.D.N.Y. 1980) and 1981-1 Trade Cas. ¶63,982 (S.D.N.Y. 1981), the court held that a manufacturer may lawfully set the price of product delivered to its customers through commissioned independent deliverymen where the manufacturer billed its customers.

The direct billing service provided by Pepperidge Farm was pro-competitive and cannot have violated the Sherman Act, much less have violated the law *per se*. *See, Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Pepperidge Farm was able to obtain authorization for its product in certain stores only by offering a direct bill at a given price (See pp. 5-7 above). Thus, Pepperidge Farm's billing practice and service enabled its products to compete against those of other manufacturers.

B. Pepperidge Farm Lawfully Marked Its Products with a Suggested Retail Price.

Pepperidge Farm products are delivered to retail stores with a pre-printed suggested retail price (See p. 15, above). Mesirow/Morris have admitted that retail stores, including Longs, change this price at will and Pepperidge Farm instructed its distributors to carry the necessary equipment to effect any

price change requested by a retail store (See p. 15, above). Morris testified:

"Q. When you sold to Longs, did Longs charge the preticketed price?

"A. No.

"Q. Did you ask them to sell the pre-ticketed price?

"A. Did I ask them?

"Q. Yes.

"A. No.

"Q. You never did?

"A. No. They sell them for—you know, they tell me what they want to sell it for.

"Q. And that's what they have always done?

"A. Right." (CR 345, Morris dep., 946:1-12).

The District Court and Court of Appeals correctly found Pepperidge Farms' suggested prices to have been lawful. (App. B-12; App. C-9). *In re Nissan Antitrust Litigation,* 577 F.2d 910, 916 (5 Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979); *Bailey's Bakery, Ltd.* v. *Continental Baking Co.,* 235 F.Supp. 705, 721-722 (D.Haw. 1964), *aff'd,* 401 F.2d 182 (9 Cir. 1968), *cert. denied,* 393 U.S. 1086 (1969).

C. The District Court Properly Dismissed Mesirow/Morris's Section 2 Claims.

Mesirow/Morris based their Sherman Act Section 2 claims on their price fixing claims, discussed above, and their unsupported assertion that Pepperidge Farm forced its distributors to sell portions of their territories to others (the evidence is discussed above at pp. 15-17), under the purported authority of *Photovest Corp.* v. *Fotomat Corp.,* 606 F.2d 704 (7 Cir. 1979), *cert. denied,* 445 U.S. 917 (1980).[6]

[6] Petitioners did not claim in the Ninth Circuit nor do they claim here that Pepperidge Farm's grant of exclusive territories was unlawful.

Photovest found Fotomat to have attempted to monopolize a "drive-thru retail photo processing submarket" when, with anticompetitive intent, it saturated the market with company owned stores, reducing the value of franchise stores, which Fotomat could then buy at a reduced price. Unlike *Photovest*, Pepperidge Farm did not add "company stores" to undermine the value of a distributor's territory. Pepperidge Farm had and has no economic incentive to force its distributors to split-off portions of their territories. It did and does have an economic incentive to increase sales of its products in every distributor's territory and to help its distributors maximize their earnings. Many Pepperidge Farm distributors increased sales in their territories by adding trucks. Others chose to split portions of their territories, selling to another distributor at a price and upon conditions set by the seller. The choice was always the distributor's and never the result of coercion by Pepperidge Farm. Petitioners' "splits" were at their own choice and to their handsome profit.

Pepperidge Farm possessed neither the requisite market power nor engaged in the anticompetitive activity necessary to violate Section 2 (App. C-11, C-12).

CONCLUSION

The opinions of the district court and court of appeals are consistent with *Simpson*, with the Fifth Circuit and with Mesirow/Morris's sworn deposition testimony. The Petition for a Writ of Certiorari should be denied, or if granted, the Ninth Circuit should be summarily affirmed.

DATED: July 22, 1983

Respectfully submitted,

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On Behalf of Respondent

APPENDIX

Fair Trade, California

California's Fair Trade law was codified in Cal. Bus. & Prof. Code ¶ 16900, *et seq.* It provided in relevant part:

"§ 16902. *Certain sales contracts declared lawful.*

(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee." Enacted, Stats 1931, ch. 278 § 1, p. 523. Amended, Stats. 1941, ch. 526 § 1, p. 1838. Repealed, effective 1/1/76 Stats. 1975, ch. 402 § 1, p. 878.

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELI MESIROW, THOMAS MORRIS,
Plaintiffs,

vs.

PEPPERIDGE FARM, INCORPORATED,
a Connecticut corporation,
Defendant.

No. C-78-1392-MHP

MEMORANDUM DECISION

This action is before the Court on cross-motions for partial summary judgment and motions in limine. Oral argument was heard on June 19, 1981. Plaintiffs complain against Pepperidge Farm, Inc. for violations of § § 1 and 2 of the Sherman Act, 15 U.S.C., and for breach of contract. Defendant counterclaims for breach of contract (causes of action 3 and 5), fraud (cause of action 6) and money due on a rolling account (cause of action 6).[1] Plaintiffs seek summary judgment against defendant on their § 1 antitrust claim and causes of action 4 and 6 of defendant's counterclaim. Defendant in turn seeks summary judgment on plaintiff's antitrust allegations.

Having considered all pleadings, documents and oral argument presented in these cross-motions, the court finds that there remain no genuine disputes of material fact and that summary judgment for defendant is appropriate on the antitrust claims. While the parties manifest disagreement on a number of issues, a careful search of the record reveals that many assertions are not adequately supported by proper evidence or that if a genuine factual dispute exists, it is not over a necessary fact. Further, the court grants summary judgment for

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[1] Defendant's first two causes of action relating to trademark infringement have been dismissed without prejudice.

plaintiffs on the fraud claim and denies it as to the rolling account allegation.

I.

BACKGROUND

Plaintiffs, Mesirow and Morris, distributed Pepperidge Farm products from January 1970 to May 1978 and from April 1970 to November 1978 respectively. During that time, each plaintiff entered into several "Consignment Agreements" with defendant in which they were designated as self-employed, independent businesspersons. During the relevant Fair Trade period, 1974 to January 1976, defendant's contracts with plaintiffs allowed it to set wholesale prices for products distributed by plaintiffs to retailers. Both during the Fair Trade period and after, a dual system of distributor and direct accounts was established. Direct billed accounts were those chain stores (three or more retail stores) for which plaintiffs acted as commissioned deliverypersons. Defendant was responsible for billing the account and received payment directly. Pepperidge Farms employees regularly visited the stores of its chain customers to check on service and arrange promotional displays. Plaintiffs were not to negotiate prices although defendant asserts that plaintiffs were free to solicit these accounts to be their own.[2] The distributor accounts were chain or individual stores serviced and billed by distributors. Defendant's employees did not provide assistance unless requested to do so by the distributor. According to defendant, plaintiffs were free to negotiate prices with these latter accounts. At all times, plaintiffs were responsible for costs of their business operation, delivery of products, and for servicing grocery shelves of all accounts. Further, they were required to absorb the costs for products that had gone over-code. Defendant retained title to the consigned goods until they were placed on retail shelves. Defendant bore the risk of loss or theft of the goods and paid applicable inventory and property taxes.

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[2] While this point is disputed by plaintiffs, they offer no evidence to support their position. Long's Drug Stores and Payless Drugs are examples of "chain" stores that remained distributor accounts. (Def's App. 2, Tierney Decl., Tab L, ¶ 15; *id.* Mesirow Dep., Tab F, 415:10-416:14.)

II.

PLAINTIFFS' SUMMARY JUDGMENT MOTION

Plaintiffs allege unlawful restraint of trade by various means, including vertical price maintenance, conspiring to restrain trade and reservation of exclusive territories. After considerable effort sorting out counsel's theories of antitrust violations, the court finds that plaintiffs' arguments lack merit and that partial summary judgment for plaintiffs on the antitrust claims should be denied.

Per Se Illegality

The backbone of plaintiffs' motion for summary judgment on the antitrust claims is the assertion of a per se vertical price-fixing violation under the authority of *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S. Ct. 1051 (1964) and *Greene* v. *General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S. Ct. 1409 (1976).[3] For the reasons set forth below, plaintiffs' per se theory of liability must be rejected.

Simpson v. *Union Oil* involved a "consignment" agreement providing for defendant Union Oil to set the prices at which plaintiff retailer sold gasoline. Title to the consigned gasoline remained with Union Oil until sold by consignee. Union Oil paid all property tax on the gasoline in Simpson's possession. By the terms of the agreement, Simpson was required to carry personal liability and property damage insurance and was responsible for loss of the consigned gasoline in his possession. Simpson received a minimum commission and paid all costs of operation. While recognizing the legitimacy of consignment agreements as a risk-of-allocation device, the Court held that when "a 'consignment' device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the 'consignment' an

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[3] Attorney for plaintiffs has had great difficulty clarifying his antitrust claims. The court is preceding on its assumption of what the claims are meant to be. However it is the responsibility of plaintiffs to clearly articulate their claims and set forth in a comprehensible fashion the facts in support. It is not the court's responsibility to create a comprehensible claim out of chaos—a predicament in which another court apparently found itself. *Zoslaw* v. *Columbia Broadcasting System, Inc.*, 1978-2 Trade Cas. ¶ 62.269 (N.D. Cal. 1978).

agency. . ." *Simpson* v. *Union Oil*, 377 U.S. at 21, 84 S. Ct. at 1057. The Court was particularly concerned that a consignee, selling only defendant's brand of gasoline, would be prevented from controlling the important economic factor of gasoline prices while being required to accept the risks and responsibilities of an independent business operation. *See id.* at 21, 84 S. Ct. at 1056-57.

Simpson stands for the proposition that consignment agreements are not to be shielded from application of antitrust principles. Consignment agreements are not to be used to effectuate otherwise improper resale price maintenance. However, the *Simpson* holding is not as firm or far-reaching as plaintiffs suggest. E.g., *see* discussion in *Greene* v. *General Foods Corp.*, 517 F.2d at 652-55.[4] *Cf. Hardwick* v. *Nu-Way Oil Co., Inc.*, 589 F.2d 806, 809 (5th Cir. 1979); *American Oil Co.* v. *McMullin*, 508 F.2d 1345, 1351-52 (10th 1975). *Simpson* is not a holding that may be extended automatically to the wholesale level. Simpson was a retailer of gasoline and the Court refers disapprovingly to "resale price maintenance"—a term of art usually referring to the retail level, not to "resale pricing" as plaintiffs represent. While plaintiffs' attorney may be prescient in discerning the unspoken extent of the Court's concern, this court is unwilling to claim such powers. Plaintiffs' argument on this point is notably deficient in their failure to cite any authority in support of their interpretation.

In addition to the retail-wholesale distinction, the present case involves parties in a significantly different contractual relationship from that in *Simpson*. Plaintiffs here are not

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[4] The court in *Greene* v. *General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S. Ct. 1409 (1976) interpreted *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S. Ct. 1051 (1964) as prohibiting devices resulting in resale price maintenance "where the risks of the distribution process are borne largely by numerous otherwise independent individuals or firms in competition with each other in a product for which there is a widespread demand [illegible] individual consumer." *Greene* v. *General Foods Corp* [illegible] *Greene* court found substantial support for its interpr[illegible] v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967) [illegible] the court upheld a finding of per se Sherman Act violations in a vertical territorial restriction scheme. However, the vitality of this suggested trend is seriously undermined by the return to the rule of reason standard enunciated in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977).

restricted to dealing only in the goods of defendant, but in fact act as distributors for a number of other manufacturers. (Def's App. 2, Mesirow Dep., Tab F, 6:11-22, 9:7-11.) While plaintiffs pay most operational expenses of their business, they are not liable for losses of defendant's products even while those products are located in plaintiffs' own warehouse. It is expected that independent business people cover operational expenses of their business. While plaintiffs were required to absorb the "risk of loss" for stale products, this risk was peculiarly within plaintiffs' control. (*Id.* Erdelen Dep., Tab D, 79:17-80:15, 92:2-7; *id.* McGovern Dep., Tab E, 367-68; *id.* Montreal Dep., Tab G, 112:8-21; *id.* Morris Dep., Tab I, 100:14-20.) The overwhelming evidence in the record is that loss of revenue from stale products was and should have been less than two percent for distributors throughout the region.[5] (*Id.* Wilson Dep., Tab K, 35-36, 157-58.) Plaintiffs present evidence that the "volume of stales was high in certain geographic areas where the individual incomes were low." (Plaintiffs' Memorandum of Law in Opposition to Pepperidge Farm's Motion for Summary Judgment, Erdelen Decl., 5:24-25.) However this kind of generalization does little to overcome the specific evidence produced by defendant. Plaintiffs point out that the stale factors of the larger-volume distributors in the area are not included in the record. However, it is incumbent upon plaintiffs to supply that information rather than attempt to support their assertion by an absence of such evidence.

While *Greene* v. *General Foods Corp.* presents facts closer to the present case, it is not dispositive. Greene was an independent distributor of defendant's coffee products who also distributed the products of other manufacturers. Unlike in *Simpson* or the present case, title to all goods passed to Greene at the time he acquired possession. Additionally, Greene bore the risk of loss of those products. Plaintiff's complaint centered around a dual distribution system whereby defendant reserved large institutional accounts (MFSAs) to itself for billing purposes. While Greene solicited and serviced these accounts to

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[5] It is difficult to escape the conclusion that plaintiffs' lax business methods did little to reduce the possibility of goods going stale on the shelf. (Def's App. 2, Mesirow Dep., Tab F, 343:20-344:15, 404:22-405:2, 518:28-519:11, 618:1-5; *id.* Morris Dep., Tab I, 86:28-87:12.)

the same extent he did his own, he was not free to negotiate his own price. The MFSA was directed to make its payments to defendant although plaintiff submitted the invoice and received a "delivery allowance" based on the size of the order and credit to his account with defendant for the payments received from the MFSAs.

The court upheld the trial court finding that General Food's distribution system was a per se price-fixing violation. The court found evidence that defendant had gone far beyond a simple announcement of terms and refusal to deal with non-complying independent distributors still permissible under *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919). The court noted that Greene was required to shoulder substantially the same risks and responsibilities as he did for his other accounts whose prices he was allowed to negotiate. The court particularly noted that title to the goods passed to Greene at the time he acquired possession. By way of contrast, the court suggested that because of retaining title to its goods, the defendant in *Simpson* "had a greater claim to dictate the price to the consuming public." *Greene* v. *General Foods Corp.*, 517 F.2d at 656-57.

While the distribution system of Pepperidge Farms and of General Foods bear a number of similarities, the distinctions are significant. Plaintiffs in the present case do not acquire title to defendant's goods and are not required to assume the risk of loss. These distinctions are not mere formalities. At one point, plaintiffs reported the loss of a substantial quantity of defendant's goods from their warehouse and were fully credited for the loss.[6] Additionally, defendant bears the risk of non-payment from retailers on the chain-store accounts and is actively involved in the sales process. *See Overhead Door Corp.* v. *Nordpal Corp.*, 1979-1 Trade Cas. ¶ 62,595 at 77,431 (D. Minn. 1978).

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[6] In 1975, plaintiffs reported a loss of and received credit for goods worth $21,386.88. Pepperidge Farms recouped approximately half this amount from their insurer. (Def's App. 2, Silk Decl., Tab O, ¶ 3.)

[7] Therefore the only sale that takes place is between defendant and the retailers and the transactions between defendant and distributors does not involve resale pricing. *See Overhead Door Corp.* v. *Nordpal Corp.*, 1979-1 Trade Cas. ¶ 62,595 at 77,431 (D. Minn. 1978).

In both *Simpson* and *Greene*, the court found that a distribution system involved illegal price-fixing. Plaintiffs seek the same relief here. However each case is distinguishable on its facts, as discussed above. Although the distribution system in *Greene* bears a resemblance to that of Pepperidge Farms, the *Simpson* case provides the closest analogy to the precise issue before us here—whether the economic risks and responsibilities established by a "consignment agreement" so alter the basic nature of consignment as to render the agreement susceptible of an illegal resale price fixing allegation. The material facts surrounding the present "consignment agreement" are not in dispute and the court finds as a matter of law that the distribution system at issue is a valid consignment arrangement.

Fair Trade Period

Plaintiffs argue that during the relevant Fair Trade period, 1974-1976, Pepperidge Farm was not entitled to the protection of the Fair Trade laws, 15 U.S.C. §§ 1, 45; Cal. Bus. & Prof. Code § 16902, because of wholesale price discrimination, retail price-fixing through use of pre-ticketing and engaging in horizontal competition with the independent distributors.

The court is unpersuaded that plaintiffs' complaint of price discrimination is sufficient to deny defendant the protection of the Fair Trade laws. In *General Electric Co.* v. *Federal Employees' Distributing Co.*, 45 Cal.2d 891, 291 P.2d 942 (1955), the court considered a challenge of discriminatory application to fair trade contracts and found that

> parties are left to their discretion as to whether they should enter into fair trade contracts at all, whether they should enter into contracts for the sale of certain commodities and not others, *and apparently whether they should enter into contracts for certain sales of the same commodity and not others.*

Id. at 894 (emphasis added). The facts of that case involved a company making exceptions to its resale contracts for certain

classes of retail purchasers. However the court believes the rationale expressed in *General Electric* is applicable to the present situation and plaintiffs have submitted no authority to dissuade it from that view. Also *see J.W.T., Inc.* v. *Kobrand Corp.*, 1973-2 Trade Cas. ¶74,726 at 94,181 (N.D. Ill. 1973).

Plaintiffs are likewise unpersuasive on the wholesale competition claim. Their reliance on *United States* vs. *McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S. Ct. 937 (1956) is unavailing. In *McKesson*, defendant employed a multitiered distribution system including sales to retailers from its wholesale division and to independent wholesalers through its manufacturing division. Resale prices in each of these relationships were set by McKesson. Independent wholesalers were in direct competition with McKesson's own wholesale division and lost economic advantage from defendant's wholesale operations. In the present case, Pepperidge Farm's distribution system is distinguishable in significant respect. While defendant is involved in direct billing of chainstore accounts, the independent distributors participate in the scheme and stand to profit from increased sales.

Contrary to plaintiffs' assertion, defendant does no mail order business in competition with its distributors. Defendant's parent company owns a separate subsidiary mail order company that sells "specialty items," including Pepperidge Farm cookies, by mail directly to the public. None of these items are sold to wholesalers, distributors or retailers. (Def's App. 2, Tierney Decl., Tab L, ¶17.) Plaintiffs do not raise a genuine dispute of fact. They merely reiterate the facts put forth by defendant and state that these facts raise the question of "whether Pepperidge Farm operates a mail order business." (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, ¶17.)

Plaintiffs' attempt to show horizontal competition is rejected. There is no evidence that Pepperidge Farm had a wholesale division set up to service and coordinate distribution and sales to retailers as existed in *McKesson*. Plaintiffs and defendant do not stand at the same 'functional level' as one another, *see United States* v. *McKesson & Robbins, Inc.*, 351

U.S. at 313, 76 S. Ct. at 942, and there is no showing of vertical integration. *See Westpoint Pepperell, Inc.* v. *Rea,* 1980-2 Trade Cas. ¶ 63,341 (N.D. Cal. 1980). *See generally* Altschuler, "*Sylvania*, vertical restraints, and dual distribution," 25 Antitrust Bull. 1 (1980).

Rolling Account

Plaintiffs' motion for summary judgment on cause of action six of defendant's counterclaim is denied. Mr. Tierney may have believed that the $30,000 received by defendant for sale of Mesirow's territory was to be credited to plaintiff's account. (Plaintiffs' Motion for Partial Summary Judgment (1/19/81, Tierney Dep.)). However, assuming that Mr. Mesirow's distributorship was terminated with good cause and without improper motive, he no longer had a legal interest in the sale of the territory. *See Noble* v. *McClatchy Newspapers*, 533 F.2d 1081 (9th Cir. 1975), *remanded on other grounds*, 433 U.S. 904, 97 S. Ct. 2966 (1977). If the agreement between plaintiffs and Pepperidge Farm was to credit the franchise sale price to plaintiffs' account, that remains to be shown at trial. Plaintiffs' showing on this part of the motion is insufficient. Exhibit 4 of Plaintiffs' Motion for Partial Summary Judgment has not been properly authenticated and does not specify what time period is affected.

Fraud

Plaintiffs have attempted to show that the reliance element of a cause of action for fraud cannot be shown by defendant. Defendant did not dispute plaintiffs' argument and it is therefore accepted as true by the court for purposes of this motion. Plaintiffs' motion on cause of action four of defendant's counterclaim is granted.[8]

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[8] Plaintiffs have filed two motions in limine. Portions of the 1978 Reny Morris deposition are prejudicial to plaintiffs within the meaning of Fed. R. Evid. 403. However none of the information contained in the deposition is relevant to the issues in this case. This is especially so because plaintiffs' motion for summary judgment on the fraud claim has been granted by the court.

Plaintiffs' motion in limine as to the Dutch Boy Cookies is rendered moot by the court's decision not to address the damages issue.

III.

DEFENDANT'S SUMMARY JUDGMENT MOTION

Defendant asserts that as to the post-Fair Trade period, (1) maintaining direct accounts with established prices was not illegal price-fixing, and (2) that it did not impermissibly coerce distributors or their accounts to adhere to fixed prices. The court agrees with defendant on both issues and therefore grants summary judgment in its favor on the antitrust claims. While summary judgment is not a favored vehicle for resolution of antitrust allegations, its use is not foreclosed and can be "a valuable means to avoid squandering judicial time and resources." *Mutual Fund Investors, Inc.* v. *Putnam Management Co., Inc.*, 553 F.2d 620, 622 (9th Cir. 1977). It is the responsibility of plaintiffs to set forth facts that will support a viable legal theory upon which it can recover. They have failed to do so upon any version of the facts before this court even when reviewed most favorably to them.

Direct Accounts

A manufacturer bearing the economic risks of distributing is permitted to control the resale price of its products without running afoul of price-fixing prohibitions. *See Greene* v. *General Foods Corp., supra; Overhead Door Corp.* v. *Nordpal Corp., supra; Hardin* v. *Houston Chronicle Publ. Co.* 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5th Cir. 1978). The issue here is whether Pepperidge Farm in practical effect bears the economic risks of distribution or whether a significant share of those risks lie with plaintiffs.

The essentially undisputed facts are that, as to Pepperidge Farm's direct accounts, distributors delivered products, serviced the shelves, and took orders for the direct account customers. (Def's App. 2, Bonesteel Dep., Tab A, 33:7-15). Pepperidge Farm employees also call upon these customers in order to promote sales and arrange for displays. These accounts are billed directly by defendant; distributors receive a percentage of defendant's wholesale prices as a commission. Pepperidge Farm bears the risk and expense of billing the direct customers. (See discussion *infra.*) Chains may choose to require direct billing. (*Id.* Carhuff Dep., Tab B, 185-86.)

While the distributor's role here involves greater participation than in some of the cases cited by defendant, plaintiffs have failed to articulate any specific economic risks they are forced to bear as a result of the direct-account distribution system. The risk of stale products is a risk beyond the usual consignment responsibility of properly caring for the consigned product. However, as mentioned earlier, this responsibility does not create the kind of economic risk associated with a finding of impermissible price controls.

Distributor Accounts

Plaintiffs argue that although they should have been able to negotiate their own prices on the distributor accounts, in fact defendant used various methods to render this freedom illusory. Defendant relies on the factual record to show that no coercive tactics were employed. Plaintiffs argue that at the least, material questions of fact remain for trial. Keeping in mind the restricted role of summary disposition, the court is unable to find genuine issues of material fact. On close examination, much of plaintiffs' record can be reduced to unsupported assertions, improper attempts to alter or ignore sworn deposition testimony, or factual distinctions without substantive impact. Particularly, the court finds that plaintiffs failed to controvert defendant's showing of permissible conduct. Defendant provides evidence that its policy was to stop directing wholesale prices to distributor accounts after 1976. (Def's App. 2, Dundon Dep., Tab C, 216:20-218:20; *id.* Mesirow Dep., Tab F, 425:19-426:6.) Plaintiffs have not produced legally sufficient evidence from which the court can find a pattern of coercion in the setting of wholesale prices. *See Mutual Fund Investors, Inc.* v. *Putnam Management Co., Inc., supra,* 553 F.2d 620; *Westpoint Pepperell, Inc.* v. *Rea,* 1980-2 Trade Cas. at 75,744.

Plaintiffs rely heavily on their assertion that Pepperidge Farm sent price lists to distributor chain accounts as a means of controlling wholesale prices. In support of this claim, plaintiffs submit one piece of hearsay testimony. (Def's App. 2, Mesirow Dep., Tab F, 426:7-22.) This evidence is not sufficient to create a genuine factual dispute against the showing by defendant that the policy and practice of Pepperidge Farm was to send such

lists only to its direct chain accounts. (*Id.* Dundon Dep., Tab C, 283:8-27.) One former district sales manager stated that from 1968 to 1971 he delivered Pepperidge Farm price lists to non-chain accounts "when requested." (Dec. Montreal in Support of Plaintiffs' Motion for Summary Judgment, 6:27-30.) Again, such an assertion is vague and not relevant to claims arising between 1974 and 1979.

Even assuming that such evidence was sufficient, plaintiffs admit that they never attempted to charge Long's a price (1977), from that used by Pepperidge Farm for its direct accounts. (*Mesirow Dep., supra,* Tab F, 421:18-422:4.) Plaintiffs have made no showing that the price negotiations between plaintiffs and its own chain accounts were not the result of those parties' respective bargaining power.

As to the pre-ticketing allegation, defendant has submitted evidence that in spite of its practice of pre-ticketing its products, retailers may initiate a change in prices. (Def's App. 2, Morris Dep., Tab I, 133:1-12; *id.,* Tab J, Tierney Dep., 385-86; *id.,* affidavits of defendant distributors, Tabs R-CC, ¶ 7.) Plaintiffs have submitted no proper evidence to contradict defendant's showing and thus there is no genuine issue of fact.[9]

Distributor Territories

Plaintiffs argue both that defendant impermissibly required exclusive territories and that it coerced distributors to split their routes in order to maintain price controls.

Territorial restraints must be judged under a rule of reason as to whether they create a substantially adverse effect on interbrand competition in the relevant market. *See Continental*

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[9] It is not inconceivable that such evidence does exist somewhere in the record. But after a more-than-diligent search, the court is unable to discern any. As with many evidentiary issues in this action, plaintiffs' papers are a jumble of incomplete cross-references and unsupported assertions. For instance, plaintiffs' attorney states "Pepperidge Farm's pre-printed retail prices are not suggested at all, but are firmly in place printed prices which establish a ceiling on a distributor's ability to negotiate prices and profit margins with retailers." (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, 14:7-10.) Such an assertion fails to meet the most minimum standard for presenting proper evidence to raise a disputed issue of fact on a motion for summary judgment.

T.V., Inc., v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977), *overruling United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967); *Cowley* v. *Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965, 100 S. Ct. 2942 (1980).

In *Cowley* v. *Braden Industries*, the court upheld the trial court's findings that defendant's near-exclusive territory restrictions did not harm interbrand competition. *Id.* at 755. Defendant represented approximately 70% of the nation's windmill market. The appellate court held that plaintiff failed to meet its burden of proving that defendant's vertical territorial restriction was unreasonable. As in *Cowley*, defendant has submitted evidence that requiring exclusive territories was necessary for assuring active interbrand competition. (Def's App. 2, Tierney Decl., Tab L, ¶ 8.) Defendant bolsters its argument of encouraging competition by presenting evidence that plaintiffs preferred to acquire exclusive territories. (Def's App. 2, Mesirow Decl., Tab F, 17:27-18:7, 725:21-25.) While the legality of territorial restrictions does not depend on whether the restriction is initially attractive to distributors, the preference of plaintiffs for exclusivity does lend support to defendant's (and distributors') position in the relevant market. The desire to obtain and maintain an exclusive distributorship is a legitimate goal and does not, without more of a showing, suggest any forbidden anticompetitive motive. *See Westpoint Pepperell, Inc.* v. *Rea*, 1980-2 Trade Cas. at 75,744.

Plaintiff relies solely on *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970) for its argument that Pepperidge Farm's dominant market position requires denial of defendant's motion for partial summary judgment. In *Industrial Building Materials*, defendant, a dominant manufacturer of sealing products, was accused of driving plaintiff out of business through unlawful means including distribution of its own products. The court relied heavily on the fact that even if defendant did not hold a monopoly position in the sealant industry, it was at least a strongly dominant factor.

Defendant here asserts that its United States market share for biscuit products (cookies and crackers) is between three and four percent.[10] Plaintiffs object to the inclusion of crackers in the definition and percentage calculation of the relevant product market. (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, 3:23-27.) However they offer no evidence to support this claim or statistics showing defendant's percent of the cookie market. Plaintiffs contend that Pepperidge Farm is a monopoly or dominant power in the "premium cookie industry." (Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exh. 1, Patch Dep., 60:7-20.)[11] The distinction between cookies "made with top quality ingredients" and cookies of more pedestrian quality may be susceptible of subjective taste but it is not susceptible of objective evaluation. The relevant market is not to be defined by advertising slogans and plaintiffs have submitted no authorities to help in this process. For instance there is no attempt to show that this distinction falls outside the standard of "commodities reasonably interchangeable by consumers for the same purposes. . . " *ALW, Inc.* v. *United Air Lines, Inc.*, 510 F.2d 52, 56 (9th Cir. 1975), citing *United States* v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 1007 (1956).

In *Industrial Building Materials,* defendant clearly held a dominant market position *and* was alleged to have driven its major independent distributor out of business. The court noted that this combination of factors resulted in a foreclosure of competition and was an unreasonable restraint of trade. *Industrial Building Materials,* 437 F.2d at 1342-43. We are not faced here with the special circumstances of that case. There is no

[10] In 1980, defendant's share of the U.S. biscuit market was 3.64%; its share of the San Francisco market was 3.2%. The respective 1975 shares were less than 3% and less than 2.5%. (Def's App. 2, Tierney Decl., Tab L. ¶ 7.)

[11] Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, states "[i]t is further demonstrated that Pepperidge Farm is a dominant company in the sale of dessert and party cookies, as distinguished from crackers. See, Declaration of Maxwell Keith, Exh. 1 herein." Aside from the fact that "Exh. 1 herein" is inexcusably imprecise, this factual assertion simply distorts and exaggerates the testimony of one Safeway manager (taken in Utah) that to his knowledge Pepperidge Farm is the only company that makes a "premium" cookie. It appears that the deponent worked at a San Francisco Safeway division between 1972 and 1975 but no proper foundation was laid clarifying that point.

evidence that Pepperidge Farm is a dominant factor in the relevant market; there is no allegation that defendant planned to reduce competition by eliminating distributors; and defendant did not engage in horizontal competition as a means of driving its major distributor out of business. "The intent of [defendant] is not at issue. Rather the issue is whether plaintiff has alleged any facts demonstrating a violation that "fits" within the requirements for an antitrust recovery, a question of law that can be answered by the court." *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1166 (7th Cir. 1978), *cert. denied*, 440 U.S. 982, 99 S. Ct. 1791 (1979).

Pepperidge Farm admits that its economic interests are served not only by an increase in sales of its products, brought about by route expansion, but also by quality service to existing accounts, sometimes brought about by route splitting. Plaintiffs argue that defendant impermissibly encouraged route splits to prevent the formation of powerful distributors and to maintain control over resale prices. Evidence presented by plaintiffs to demonstrate improper motive shows only that defendant encouraged its managers to induce route splits. (Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exh. 6, Montreal Dep., 49-57, 78-79; *id.*, Erdelen Decl., 2:16-20, 7:16-29.) Defendant provides support for its assertion that suggesting or encouraging route splits was done for the legitimate purpose of improving service. (Def's App. 2, Dundon Dep., Tab C, 307:18-308:19, 315:19-316:16; *id.*, Tierney Dep., Tab J, 267.) Alleging improper motives is not by itself sufficient to raise a genuine dispute of fact or to adequately support a reasonable inference in plaintiffs' favor. There is deposition testimony from a former Pepperidge Farm territorial sales manager (whose position with defendant is not properly established in plaintiffs' exhibit) that pressure was put on him to get a route split from one of the distributors because the distributor was becoming "too successful." (Montreal Dep., Exh. 6, *supra*, 51-56, 61-66.) However this incident occurred in 1970 and the same deponent testified that such conduct was exceptional. Mr. Montreal reiterated the testimony of others that the major concern in route splits was encouraging distributors to improve service.

While the burden of proof is not on plaintiffs to demonstrate the existence of a material issue of fact, once defendant has made a showing of understandable and legitimate business practices, plaintiffs must come forward with specific facts showing that there remains a genuine issue for trial. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-90, 88 S. Ct. 1575, 1592-93 (1968); *Blair Foods, Inc.* v. *Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980). This they have not done after ample opportunity to do so but have relied on a record lacking significant probative evidence to support their factual contentions or connect these contentions to plausible legal theories.

Section 2 Claim

The elements of a § 2 claim for attempt to monopolize are "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, slip. op. 3917 (9th Cir. Aug. 7, 1981). Although defendant's motion on the § 2 claim could have been more clearly enunciated in its moving papers, the record is sufficient to dispose of this claim as well. Plaintiffs rely on the substantive allegations of their § 1 claim to demonstrate predatory or anticompetitive conduct. The court's findings with regard to the § 1 claim apply to the § 2 claim and lead to the conclusion that anticompetitive conduct has not been shown. Additionally, while not indispensable, market power is a relevant factor in determining probability of success. *Blair Foods, Inc.* v. *Ranchers Cotton Oil*, 610 F.2d at 669. As discussed earlier, plaintiffs' unsupported assertions do not withstand summary disposition of that issue. Even under the "short-cut method" of this circuit enunciated in *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S. Ct. 1280 (1979), plaintiffs would need to present sufficient evidence of predatory conduct. Plaintiffs having failed in this showing, the court finds that no purpose would be served by going to trial on the § 2 claim and

therefore grants summary judgment to defendant on plaintiffs' allegation of attempt to monopolize trade.[12]

For all of the above reasons, the court denies plaintiffs' motion for summary judgment on the antitrust claims and the rolling account, and grants the motion as to the fraud claim. Further, the court grants summary judgment to defendant on the various antitrust claims. Parties are to prepare for trial only on the breaches of contract and rolling accounts claims.

DATED: August 31, 1981

MARILYN HALL PATEL
UNITED STATES DISTRICT COURT JUDGE

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[12] Because the court has determined that no anticompetitive behavior has been shown, it is unnecessary to decide the issue of damages and the court declines to do so.

United States Court of Appeals

FOR THE NINTH CIRCUIT

January 25, 1983

ELI MESIROW AND THOMAS MORRIS, *Plaintiffs-Appellants,* vs. PEPPERIDGE FARM, INC., a Connecticut corporation, *Defendant-Appellee.*	No. 81-4471 (N.D. Cal. No. C-78-1392 MHP) OPINION

Appeal from the United States District Court
For the Northern District of California
Honorable Marilyn Hall Patel, District Judge, Presiding
Argued and Submitted September 14, 1982

Before: DUNIWAY, FLETCHER and BOOCHEVER, Circuit Judges

DUNIWAY, Circuit Judge:

Plaintiffs Eli Mesirow and Thomas Morris appeal from the district court's dismissal on summary judgment of their claims against Pepperidge Farm, Inc., under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They also ask us to review two orders imposing fines on their counsel during discovery. We affirm the dismissal of the antitrust claims, and decline to review the discovery sanctions for lack of jurisdiction.

I.

Facts.

Plaintiffs distributed Pepperidge Farm biscuits, cookies and other products from January 1970 to May 1978, and from April 1970 to November 1978, respectively. The terms of the relationship between plaintiffs and Pepperidge were set down in "consignment agreements" that designated the distributors as self-employed independent businesspersons. The agreements established a dual system of accounts for Pepperidge distributors, including plaintiffs: chain stores of three or more retail stores billed directly by Pepperidge, and chain or individual stores that distributors billed. Pepperidge employees regularly visited the stores of its direct-billed accounts to check on service and arrange promotional displays, but distributors such as plaintiffs actually delivered and installed the Pepperidge Farm products in these stores, as they did in the other stores. In all cases, Pepperidge retained title to the goods until they reached the retailers' shelves. Accordingly, it bore the risk of loss or theft of the goods, even while they were in the hands of the plaintiffs. It also paid applicable inventory and property taxes on the goods.

Both during the relevant Fair Trade period and after, Pepperidge set the wholesale prices to be charged direct-billed customers, which paid Pepperidge directly; plaintiffs were forbidden to negotiate different prices with them. Plaintiffs were free, however, to solicit these customers to be their own. Plaintiffs set wholesale prices for their own accounts, which included both chain and individual stores. Pepperidge employees did not help on these accounts unless plaintiffs asked them to do so.

Pepperidge gave each of its distributors, including plaintiffs, the exclusive right to solicit and sell to stores within a specific geographical territory. Though distributors were thus prohibited from selling to retailers outside their territories, they were permitted to, and plaintiffs did, within those areas, distribute other manufacturers' goods in addition to Pepperidge's. Distributors paid their own operating costs of deliveries to the customers Pepperidge billed directly as well as to their

own customers. In addition, they were required to absorb the cost of products that went stale while sitting in their warehouses or on retailers' shelves in their territories.

Plaintiffs, who are step-brothers, operated their Pepperidge distributorships jointly. They several times "split" their territories by selling to others the right to deliver Pepperidge Farm products within portions of those areas. Pepperidge terminated Mesirow's franchise for cause in May 1978. Morris sold his franchise later that year.

Plaintiffs' complaint alleged that Pepperidge violated §§ 1 and 2 of the Sherman Act both during and after the Fair Trade period, and breached its contracts with plaintiffs. Pepperidge counterclaimed, alleging trademark infringement, breach of contract, fraud and money due on rolling account. On cross motions for summary judgment, the trial court dismissed plaintiffs' antitrust claims, and entered judgment under F.R. Civ. P. 54(b). Plaintiffs filed a timely appeal from that judgment. The notice refers only to "the judgment entered pursuant to Fed. R. Civ. P. 54(b) . . . on September 4, 1981."

II.

The Antitrust Claims.

A. Pepperidge Farm Accounts: Post-Fair Trade Period.

Plaintiffs first contend that Pepperidge's practice, after the repeal of Fair Trade laws, of fixing the wholesale prices charged its direct-billed customers was a *per se* violation of § 1 of the Sherman Act as defined by *Simpson v. Union Oil Co. of California*, 1964, 377 U.S. 13, 84 S. Ct. 1051, 12 L.Ed.2d 98. That case held a purported "consignment" arrangement between an oil company and a retailer illegal because it prohibited the retailer from setting its own resale prices for the oil company's product.

Simpson, however, does not outlaw every consignment arrangement. There is "nothing illegal" about a system in which an owner of an article sends it to a dealer who undertakes to sell it only at a price determined by the owner.

377 U.S. at 21. Three factors distinguish the Pepperidge consignment agreement at issue here from the Simpson arrangement: the agreement here set wholesale, not retail prices; Pepperidge, not the plaintiffs, bore the greater burden of risk during the consignment period; and the arrangement did not coerce the plaintiffs as the Simpson contract did. We need not decide here whether any of these factors alone would prevent application of the *Simpson* rule to the consignment agreement here. Together, they bar a finding that the Pepperidge agreement was *per se* illegal.

1. Wholesale price fixing.

Simpson was a retailer of the defendant oil company's products. Plaintiffs were wholesale distributors of Pepperidge products. The trial court concluded that Simpson is not a holding that may be extended automatically to the wholesale level," and we have been unable to find express authority to the contrary.

Plaintiffs argue that *Greene* v. *General Foods Corp.*, 5 Cir., 1975, 517 F.2d 635, supports the application of *Simpson* to a wholesale distributorship. Plaintiff Greene in that case distributed coffee goods to "large institutional buyers" such as motel chains. *Id.* at 639, 642 n.4 But the court clearly assumed that he was a retailer, not a wholesaler. *Id.* at 652. We have once considered applying *Simpson* to a contract between a producer and wholesalers. In *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 9 Cir., 1975, 523 F.2d 668, a wholesale distributor alleged *per se* antitrust violations in the form of vertical price fixing by a manufacturer. Citing *Simpson*, we affirmed the dismissal of the claim for lack of evidence. 523 F.2d at 674. *See also American Oil Co.* v. *McMullin*, 10 Cir., 1975, 508 F.2d 1345, 1351-1352, affirming a judgment against a bulk distributor of oil products that had charged a producer with *Simpson* violations. In neither case did the court specifically decide whether *Simpson* could bar a consignment agreement involving a wholesaler instead of a retailer. Thus, we are not prevented from holding that the wholesale context of the agreement in the case before us is at least a factor in immunizing Pepperidge from *Simpson* illegality.

Language in *Simpson* itself supports such a conclusion. As the trial court noted, the Court in that case repeatedly used the term "resale price maintenance," which is a term of art usually referring to the retail level. At one point, the Court explicitly stated: "Nor does § 1 of the Sherman Act tolerate agreements for *retail* price maintenance." 377 U.S. at 18 (emphasis added). Plaintiffs attempt to represent the *Simpson* holding as a ban on "resale pricing," but there is nothing in that opinion, which speaks, e.g., of a "retail merchant," 377 U.S. at 18, and "retail sales," *id.* at 21, to directly support its application to wholesalers.

2. Allocation of Risk.

Another factor in our decision is the significantly greater risks borne by Pepperidge than were borne by the defendant in *Simpson.* The *Simpson* Court reviewed various "indicia of entrepreneurs," 377 U.S. at 20, possessed by the plaintiff there, concluding that Simpson was in fact an independent businessman burdened illegally by his contract with defendant. Here, however, the risk of entrepreneurship with regard to the direct-billed accounts falls mainly on Pepperidge.

In *Simpson,* although the defendant paid property taxes on the goods and retained title to them until they were finally sold by the retailer Simpson, the retailer was liable for losses or damage to the product while it was in his possession, and was required to insure against such loss. 377 U.S. at 15. Plaintiffs were not burdened with the risks and responsibilities imposed on Simpson. Title to the baked goods remained with Pepperidge until delivery to a retailer—and so did liability for losses and damage. Pepperidge, not plaintiffs, purchased insurance against such risks. Although plaintiffs, like Simpson, were responsible for their own operating costs and received a commission on deliveries, Pepperidge was liable for the risk and expense of billing the customers. Plaintiffs make much of their own liability for stale goods, a risk that the trial court found to be "beyond the usual consignment responsibility of properly caring for the consigned product." We do not find incorrect her conclusion that as the risk of stales was one peculiarly within plaintiffs' control, it was not sufficient to make the arrangement *per se* illegal.

Plaintiffs' reliance on *Greene* v. *General Foods Corp., supra*, on this issue is misplaced. The court in that case found that the defendant had engaged in conduct *per se* illegal under *Simpson*, but the agreement's allocation of the risks of the arrangement was far different from the allocation in the Pepperidge agreement. In *Greene*, plaintiff distributor purchased the goods from defendant manufacturer and resold them. 517 F.2d at 640-641. The distributor held title to the goods and bore the risk of loss or damage to them until they were delivered to his customers. *Id.* The distributor also was responsible for billing the accounts, although the manufacturer bore the risk of default on credit sales. *Id.* Finally, the distributor was charged with promoting the goods and performing the day-to-day tasks necessary to maintain customer satisfaction. *Id.* at 657-658. As we have noted, Pepperidge, in the agreement with plaintiffs, retained title to the consigned goods and bore the risk of loss or damage to them. The goods were consigned to the distributors, not sold to them. In addition, Pepperidge, not the distributors, promoted the goods to the direct-billed accounts and had the sole responsibility of routinely servicing those accounts. And unlike the plaintiffs in *Greene*, Pepperidge's distributors were free to solicit the direct-billed accounts to be their own.

3. Coercion.

The third factor that distinguishes the consignment arrangement at issue here from that in *Simpson* is the absence of coercion in the Pepperidge agreement. *Simpson* held that "a supplier may not use coercion on its retail outlets to achieve price maintenance. . . . [I]t matters not what the coercive device is." 377 U.S. at 17. The vice of the consignment in issue there was that it "coercively laced [dealers] into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive." 377 U.S. at 21. The agreement bound Simpson so tightly that it took from him his "only power" to be a wholly independent businessman—the power to set his retail price. *Id.*

Plaintiffs are unable to demonstrate such coercion here. The *Simpson* Court was concerned with preventing a producer from curbing competition among the sellers of a single brand of product. Here, on the contrary, the evidence shows that Pepperidge distributors were free to solicit the producer's customers to be their own. They were not necessarily bound, therefore, to sell to retailers at prices specified by Pepperidge.

In view of these three factors, therefore, we affirm the trial court's dismissal of plaintiffs' § 1 *per se* claim covering the post-Fair Trade period.

B. Pepperidge Farm Accounts: Fair Trade Period.

Plaintiffs also challenge the legality of Pepperidge's consignment agreements during the Fair Trade period, from June, 1974 through March, 1976. These agreements set the prices at which distributors sold Pepperidge goods to retailers.

Before 1976, federal law permitted fair trade agreements in which producers set resale prices for their goods. 15 U.S.C. § 1 (relevant part repealed by Pub. L. 94-145, 89 Stat. 801 (1975)); 15 U.S.C. § 45(a)(2)-(5) (repealed by Pub. L. 94-145, 89 Stat. 801 (1975)). Plaintiffs, however, argue that the Pepperidge agreements were illegal because they fixed prices horizontally, in violation of 15 U.S.C. §§ 1 and 45(a)(5), which, before the 1975 amendments, prohibited fair trade agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." They contend that when Pepperidge set wholesale prices, it competed with its distributors, "who also had potential to set a wholesale price."

Plaintiffs' contention is not, as they claim, supported by *United States* v. *McKesson & Robbins, Inc.*, 1956, 351 U.S. 305. The Court in that case held that §§ 1 and 45(a) did not exempt from antitrust prohibitions an agreement between a producer and a distributor who in fact competed against each other. Defendant manufacturer in *McKesson* sold goods under Fair Trade agreements both to independent distributors and to retailers. As a wholesaler, it competed directly, therefore, with the independent distributors on whom it imposed price restric-

tions. Pepperidge, on the other hand, sold only through its distributors, who, as the trial court found, profited from all Pepperidge sales, even those that Pepperidge directly billed.

The trial court also found that Pepperidge did no mail order or retail business in competition with its distributors, and plaintiffs have directed our attention to no evidence to the contrary. Pepperidge therefore did not compete "at the same functional level" with its distributors, *McKesson*, 351 U.S. at 313. As a result, summary judgment for Pepperidge on the antitrust claim covering the Fair Trade period was proper.

C. Pepperidge Farm Accounts: Interim Violations.

Plaintiffs complain that the trial court did not respond to their claim that Pepperidge's practice of setting wholesale prices for its direct-billed customers between March 1976, when Fair Trade ended, and May 1977, when Pepperidge consignment agreements were signed, violated §1 of the Sherman Act. Though the trial court's decision did not discuss the interim allegations specifically, it dismissed them along with plaintiffs' other antitrust claims. We affirm because we find nothing improper in Pepperidge's conduct after the repeal of Fair Trade.

D. Distributors' Accounts.

Plaintiffs argue that although Pepperidge claims that distributors were free to set the prices they charged all customers other than those the manufacturer billed directly, Pepperidge used various methods to render that freedom illusory. For example, they refer to a type of account they term a "hybrid direct chain account," in which, they say, the distributor billed at prices set by Pepperidge. But plaintiffs' contention that distributors were not free to set prices for their own accounts is set forth only in Mesirow's declaration filed in opposition to

Pepperidge's motion to dismiss. It directly contradicts Mesirow's own earlier deposition testimony that he "always" priced products he sold to stores he billed directly at amounts different from any price that Pepperidge might have specified. Mesirow's conflicting statements do not create a factual dispute sufficient to avoid summary judgment. They raise sham issues. *Radobenko* v. *Automated Equipment Corp.*, 9 Cir., 1975, 520 F.2d 540, 544.

Plaintiffs also say that Pepperidge sent price lists to distributors' customers as a means of controlling wholesale prices. But the one relevant piece of evidence they submitted is hearsay, and insufficient to create a genuine factual dispute because it was not made on personal knowledge. F.R. Civ. P. 56(e). Plaintiffs further argue that Pepperidge controlled its distributors' wholesale prices by pre-printing a suggested retail price on the packages of its baked goods. But they have not contradicted Pepperidge's showing that retailers could change the pre-printed prices. By itself, the pre-printed price did not violate antitrust restrictions. *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, D. Hawaii, 1964, 235 F. Supp. 705, 722, *aff'd*, 9 Cir., 1968, 401 F.2d 182.

E. § 2 Claims.

Plaintiffs also assign the trial court's dismissal of their claims that Pepperidge monopolized and attempted to monopolize, in violation of § 2 of the Sherman Act as error. They apparently base their § 2 allegations on the price-fixing claims discussed above and on Pepperidge's practice of encouraging the division of distributors' sale and delivery territories into smaller geographical areas.

1. Monopolization.

Monopoly power in the relevant market is one of the three essential elements of § 2 monopolization. *Forro Precision, Inc.* v. *International Business Machines Corp.*, 9 Cir., 1982, 673 F.2d 1045, 1058. The trial court found that Pepperidge was not a dominant factor in the relevant market. Plaintiffs argue that the judge's finding should be overturned because she failed to consider the proper submarkets. But the relevant market is a

question of fact, and the trial court's finding should not be overturned unless it is clearly erroneous. *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 9 Cir., 1982, 676 F.2d 1291, 1299. We do not find it clearly erroneous.

2. Attempted monopolization.

Specific intent and anticompetitive conduct are essential elements of a claim of attempted monopolization. *Forro, supra*, 673 F.2d at 1059. Here, plaintiffs tried to prove the required specific intent with evidence of Pepperidge's anticompetitive conduct. *See id.; California Computer Products, Inc.* v. *International Business Machines Corp.*, 9 Cir., 1979, 613 F.2d 727, 736-737. Where there is no proof of market power, however, the conduct to support an inference of specific intent to monopolize should be of a kind clearly threatening to competition or clearly exclusionary. *Forro, supra*, 673 F.2d at 1059. Plaintiffs' claims fall far short. We disposed of their price-fixing claims above. As to the splits of territory, as the trial court found, they showed only that Pepperidge encouraged its managers to promote such divisions of distributors' territories. Pepperidge introduced evidence showing the legitimate intent and effects of such conduct, and plaintiffs offered no relevant evidence to contradict that conclusion. Their citation to *Photovest Corp.* v. *Fotomat Corp.*, 7 Cir., 1979, 606 F.2d 704, is not in point because there the franchisor solicited its francisee's customers for itself. Here, other distributors are the beneficiaries of route splits.

III.

Discovery Sanctions.

Finally, plaintiffs ask us to review the discovery sanctions totaling $750 assessed against their counsel. Counsel was ordered to pay $250 in expenses and attorneys' fees following denial of a motion to compel production of documents, and $500 when the trial court denied a request to redepose, after the close of discovery, a Pepperidge employee who had since been discharged from his job.

Leaving aside the question of whether our jurisdiction is proper in view of the fact that plaintiff's notice of appeal did not mention the discovery sanctions, we lack jurisdiction for another reason. An order imposing a sanction upon counsel, a non-party, is final and appealable by the person sanctioned, when imposed. *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 9 Cir., 1982, 680 F.2d 647, 648; *Liew* v. *Breen*, 9 Cir., 1981, 640 F.2d 1046, 1048. No such appeal was taken. The order imposing the $250 fine was filed June 23, 1980; the order imposing the $500 fine was filed March 16, 1981. Plaintiffs' notice of appeal was not filed until September 10, 1981. We note that in both *Reygo Pacific Corp.* and *Liew*, *supra*, the appeal was by the non-party who was sanctioned. Assuming, without deciding, that the client can appeal from an order imposing a sanction on his attorney, the appeal is too late. F.R. App. P. 4(a). Therefore, we lack jurisdiction to consider the validity of the sanctions.

The judgment appealed from is affirmed.

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PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

MESIROW v. PEPPERIDGE FARM	No. 81-4471

BOOCHEVER, Circuit Judge, concurring.

I would not address the issue of whether an attorney in a case may wait until final judgment to appeal sanctions imposed during the earlier course of proceedings. We have permitted attorneys to file appeals within thirty days from the entry of orders imposing such sanctions. *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F.2d 647, 648 (9th Cir. 1982); *Liew* V. *Breen*, 640 F.2d 1046, 1048 (9th Cir. 1981); until now, we have never ruled on whether the attorney's appeal may also be joined with that of the party at the conclusion of the case. There are strong policy reasons against piecemeal appeals which weigh in favor of encouraging the joinder of the attorney's appeal with that of his client.[1] I believe, however, that we have no jurisdiction to resolve the issue at this time.

There were multiple claims and counterclaims filed in this case. On September 4, 1981, the trial judge ruled only on plaintiff's antitrust claims and entered judgment under Fed. R. Civ. P. § 54(b) as to those claims alone. Moreover, the notice of appeal refers only to "the judgment entered pursuant to Fed. R. Civ. P. § 54(b) . . . on September 4, 1981." Thus, our jurisdiction is limited to review of those antitrust claims and we have no authority to consider the appeal from imposition of sanctions.

[1] *Eastern Maico Distributors, Inc.* v. *Maico-Fahrezeugfabrick*, 658 F.2d 944 (3d Cir. 1981). *See also* C. Wright, A. Miller, C. Cooper 15 *Federal Practice and Procedure*, § 3911, 498-99 (1976).

NO. 82-1931

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

ELI MESIROW and THOMAS MORRIS,

Petitioners,

vs.

PEPPERIDGE FARM, INCORPORATED,
a Connecticut corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. STARE DECISIS PRECLUDES SUMMARY JUDGMENT FOR PEPPERIDGE FARM ON ITS COERCIVE PRICE FIXING BY CONSIGNMENT AGREEMENT PROGRAM.

A. Under Simpson, the Only Issues of Fact Are Whether After 1977 Price Fixing Exists as to The Distributor's Chain Accounts and Whether Attempted Monopolization Exists in a Dominant Manufacturer's Control of The Business of a Nationwide Group of Independent Cookie Distributors.

In Simpson v. Union Oil of California, this Court held that coercive utilization of consignment agreements in a Fair Trade State which brought about business losses and loss of values was actionable per se under Section 1 of the Sherman Act (377 U.S. 13, 24-25). The McGuire Act in such a state raised an affirmative defense only.

It is manifest that the lower courts have raised the dissenting opinion of Justice Stewart as the law of the land and that only this Court may correct the error.

1. Respondent cannot avoid the substantial evidence that it fixed and controlled the distributors' prices to their chain accounts.

The basis of the error below is made clear by reason of Respondent's Brief in Opposition (hereinafter "Respondent's Brief"). It urges at p. 8 that summary judgment may be granted on this issue because petitioners admit that they always sold their accounts at different prices than Pepperidge Farm's. The claim is that the testimony (CR. 216, 62:14-19) had reference to Longs (Respondents Brief, p. 8). But there is not one mention of Longs in this citation. The testimony has reference only to Mom and Pop stores that were charged 24 cents a case more. The next claim of Pepperidge Farm is that the testimony of petitioner Mesirow was that he charged Longs a different price than Pepperidge Farm's price (Id., p. 9). This testimony disclosed that when Mr. Mesirow did attempt the different price, he was warned not to do so (at CR. 216, 419-426),

and that he stopped doing so (Petition, pp. 42-43).

Respondent also contends that "After the repeal of Fair Trade, Pepperidge Farm informed the distributors that it would no longer attempt to control in any way the wholesale prices charged by distributors to accounts which the distributors billed." (Respondent's Brief, p. 6.) In fact, the only documented information given to the nationwide group of distributors was that Fair Trade had been invalidated. The letter that Pepperidge Farm wrote to the distributors is contained in the appellate court files pursuant to a motion to augment the record made on May 27, 1982. The appellate court issued an order denying the motion, but allowed the letter to be lodged with the court. The order is attached hereto as Appendix A herein, and the letter of February 24, 1976 is attached hereto as Appendix B.

Another claim is that after Fair Trade any distributor was free to solicit any

chain to become the distributor's own customer (Id., p. 7). Petitioner's argument was that the distributor declarations filed by respondent would show a significant variation if this were true; the effect test (Petition, at pp. 45-49). The reply is that petitioners deliberately falsify the record and violate a good faith duty of accuracy (Respondent's Brief, pp. 7, 18). There is no excuse for this attempt to avoid the inferences to be drawn from respondent's self-serving declarations, prepared by its counsel. The issue is solicitation of the directly billed accounts (Petition, pp. 45-49). Petitioners' heading stated the issue. It is to be noted that petitioners filed an errata letter and served it on counsel for Pepperidge Farm on June 8, 1983. It informed Pepperidge Farm that the chart heading on p. 47 should have read, "Are Chain Accounts of P.F. Billed By the Distributor (Listed at 475, 481)." The directly billed chain accounts of Pepperidge

Farm listed at ER. 475, 481 are: Safeway, Lucky, Alpha Beta, QFI, Ralphs Market, Brentwood, Albertsons, Cala, Fry's, P & X, Co-op, Petrini, Park & Shop, P & W Market, and Piedmont.

The accounts listed at Respondent's Brief, p. 7, were thus shown not to be directly billed accounts of Pepperidge Farm except for Mr. Hermann. Thus respondent's declarations from the distributors show no significant variation.

The claim that the distributors were free to solicit any chain to become the distributor's own account is also directly contradicted by its written agreement which states that these accounts will be solicited on behalf of Pepperidge Farm. Pepperidge Farm cannot avoid in summary judgment the undisputed testimony that Mr. Mesirow was ordered not to bill Safeway or face the full pressure of Pepperidge Farm (Petition, p. 20).

The claim that Pepperidge Farm assumes all risks of the product is unsupport-

able. The Pepperidge Farm defense of negating the risk of stales is based on falsification of the facts. The first falsification is that Thrift Stores will accommodate the return of stales. Pepperidge Farm had maintained four Thrift Stores in Southern California during the period 1975 to July, 1977. These four Thrift Stores were closed thereafter and one was moved thereby reducing Pepperidge Farm's ability to handle over-codes (ER. 611, 1507). The Thrift Store expressly reserved the right to reject returns based upon their needs. Pepperidge Farm took steps to caution the distributors on the right of rejection (ER. 453, 1507).

The claim that stales constitute 2% of the Distributors' sales is based upon Thrift Store returns. Yet the Thrift Stores have an absolute right of rejection (ER. 453. Mesirow Dep., CR. 216, 467, 471, 472). The large quantities of stales shouldered by petitioners are the result of quotas and pressure tactics (ER. 440,

444-448). The Longs account was to be Pepperidge Farm's "safety valve" (Id.). The distributors of Pepperidge Farm who capitulated to its request to sign declarations against their interests and whose volume is analogous to petitioners' did not indicate the percentage of their volume of stales (Mr. Hermann; ER. 1341-1346; for his volume, see ER. 474).

It is said that Petitioners' stale problems are, in part, because they over-ordered on promotions because it made them feel like "big guys" (Respondent's Brief, p. 13). The precise testimony is that the Pepperidge Farm Manager pushed the petitioners into over buying by stating: "You're the big guy. You can do it." (ER. 949-950.)

Another claim is that the stales problem arose because Mesirow and Morris were at all times free to order whatever quantities they chose and over-ordered (Respondent's Brief, p. 13). These references point to an opposite conclusion; they

refer to automatic shipments by Pepperidge Farm, or "standard orders." Pepperidge Farm places the distributor on a computer and he gets a standard shipment from Pepperidge Farm unless he makes a prior cancellation. Should he miss the cancellation deadline or miscalculates, he will have over-ordered (ER. 63). Standard orders are simply another product risk shouldered by the distributor. This is especially so shortly after territorial splits because there is no experience with the narrowed territory.

The evidence is that petitioners were a major factor for the success of Pepperidge Farm in the San Francisco Bay Area (ER. 447).

B. Petitioners Were Severely Damaged By The Policies of Pepperidge Farm.

1. Pepperidge Farm has engaged in unsupported argument in its claim that petitioners obtained capital gains on the territory splits.

The chart of claimed gains on the territorial splits is utter final argument

(Respondent's Brief, p. 17). It ignores petitioners' $238,000 investment in their business and the reasons for the sales (ER. 1480). The damage claims of petitioners are substantial (ER. 385). If reasonable amounts are allocated for the managerial and accounting time shouldered by petitioners they have never made a cent from distributing Pepperidge Farm products (ER. 442-443). Pepperidge Farm knows that it is obtaining the services of independent distributors and saving at least $20,000 per year per man by avoiding union wage scales (ER. 442).

C. Pepperidge Farm Cannot Avoid the Substantial Evidence that Territorial Splits are Coerced.

The temerity of Pepperidge Farm is exposed in its assertions concerning Section 2 of the Sherman Act (Respondent's Brief, pp. 15-16). However, the record contained the testimony from Mr. Montreal, its ex-District and Territorial Sales Manager of specific efforts to pressure a route split (ER. 1440, 1442, 1446:1-

1447:5; 1458-1459; 1462).

Mr. Montreal testified that Mr. Tierney advocated that Pepperidge Farm managers do what had to be done regardless of the legalities. Mr. Montreal testified at ER 1460:18-26:

> **Q.** What do you recall about that subject matter with Mr. Tierney?
>
> **A.** I recall at that same sales meeting, that Midwestern sales meeting, that we discussed at length how we should not try to enforce upon distributors policies that we had no right to enforce upon them.
>
> **Q.** And what did he say?
>
> **A.** He said that I'd just have to figure out a way how to do it."

The Declaration of Mr. Tierney is the core of Pepperidge Farm's motion for summary judgment (ER. 1048-1055).

Dated: August 31, 1983.

Respectfully submitted,

Maxwell Keith
Attorney for Petitioners

FILED
MAY 27, 1982
PHILLIP B. WINBERRY,
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELI MESIROW AND THOMAS MORRIS, Plaintiffs-Appellants,	No.81-4471
vs.	DC# CV-78-1392 MHP Northern California
PEPPERIDGE FARM, INC., a Connecticut corporation, Defendant-Appellee.	ORDER

Before: ANDERSON, Circuit Judge

Appellants' motion to augment the record on appeal by adding the February 24, 1976 letter attached to the motion is denied. However, the letter shall be lodged with the court for such consideration as the panel that hears the case on its merits deems appropriate.

United States
Circuit Judge

February 24, 1976

DEAR DISTRIBUTOR OF PEPPERIDGE FARM PRODUCTS:

As you are probably aware, Fair Trade Agreements have been invalidated by federal statute effective March 11, 1976. Accordingly, this is to advise you that the Fair Trade Agreement between you and Pepperidge Farm, Incorporated will not be effective after March 11, 1976.

Kelly K. Lund

KKL/pew

cc: J.W. Khashou
All DSM's

DECLARATION OF SERVICE BY MAIL

I am a citizen of the United Sttes and a resident of the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within above-entitled action. My business address is 440 Grand Avenue, #401, Oakland, California. On this day I served the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing 3 true copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail Box at San Francisco, California, addressed to said court and to counsel for respondent addressed as follows:

Forrest A. Hainline, III
Pierson, Ball & Dowd
1200 18th Street, NW
Washington, D.C. 20036

Dated September ____, 1983 at San Francisco, California.

____
Maxwell Keith